

LIBRARY
SUPREME COURT, U.S.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1954

No. 11

**LUMBERMEN'S MUTUAL CASUALTY COMPANY,
PETITIONER,**

vs.

FLORENCE R. ELBERT

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

PETITION FOR CERTIORARI FILED JUNE 13, 1954

CERTIORARI GRANTED MAY 17, 1954

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

No. 11

LUMBERMEN'S MUTUAL CASUALTY COMPANY,
PETITIONER,

vs.

FLORENCE R. ELBERT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

INDEX

	Original	Print
Proceedings in U.S.C.A. for the Fifth Circuit	a	1
Caption	a	(omitted in printing)
Record from U.S.D.C. for the Western District of Louisiana, Shreveport Division	2	1
Complaint	2	1
Motion for production of documents and names of witnesses	7	5
Motion to dismiss	9	6
Motion by defendant to strike plaintiff's demand for jury trial	10	7
Minutes of the court, February 22, 1952	11	8
Answer	12	8
Opinion, Dawkins, J.	15	11
Motion for rehearing on defendant's motion to dismiss	37	26
Stipulation re residence of parties	38	27
Minutes of the court, September 29, 1952	39	28

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MAY 28, 1954.

Record from U.S.D.C. for the Western District of Louisiana, Shreveport Division—Continued		Original	Print
Opinion, Dawkins, J., on motion for rehearing		41	28
Judgment		59	41
Notice of appeal		60	42
Request that record on appeal be printed prior to transmission to U.S.C.A. for Fifth Circuit		61	43
Statement of points on which complainant-appellant intends to rely		62	43
Designation of contents of record on appeal		63	44
Bond (omitted in printing)		63	
Motion and order to send policy up on appeal		66	44
Clerk's certificate (omitted in printing)		67	
Argument and submission		68	46
Opinion, per curiam		68	46
Judgment		70	48
Petition for rehearing		71	49
Opinion, per curiam		75	51
Opinion, Rives, J., dissenting, on petition for rehearing		75	51
Order denying petition for rehearing		84	60
Clerk's certificate (omitted in printing)		84	
Order granting certiorari		85	61

[fol. a-1]

[Caption omitted]

[fol. 2]

**IN UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF LOUISIANA, SHREVE-
PORT DIVISION**

Civil Action No. 3548

MRS. FLORENCE R. ELBERT

VS.

LUMBERMAN'S MUTUAL CASUALTY COMPANY

COMPLAINT

To the Honorable Judges of the United States District
Court in and for the Western District of Louisiana,
Shreveport Division.

The plaintiff herein, Mrs. Florence R. Elbert, respectfully represents:

1

Petitioner is and was at all times hereinafter mentioned, a widow, a citizen of the State of Louisiana, having her residence and domicile in the Parish of Caddo, State of Louisiana, within the Western District of Louisiana, Shreveport Division.

2

The defendant herein is Lumbermen's Mutual Casualty Company, a corporate citizen of the State of Illinois, but has duly qualified to transact business in the State of Louisiana, and service of process upon it can be made through the Secretary of State, State of Louisiana, at Baton Rouge, Louisiana, its duly appointed agent for service of process.

[fol. 3]

3

The amount in controversy exceeds \$3,000.00, exclusive of interest and cost; accordingly, the jurisdiction of this Court is invoked because of the diversity of citizenship between the plaintiff and the defendant.

Petitioner shows that at all times herein mentioned the defendant had issued, and there was in full force and effect, a policy of public liability insurance issued by the defendant to S. W. Bowen, 147 Boulevard Street, Shreveport, Louisiana, by the terms of which the defendant insured and indemnified and agreed to hold harmless the said S. W. Bowen, the members of his household, including his wife, and others operating the below described automobile with his permission, as provided for in said policy, from all claims of judgments arising out of the negligent operation of one certain 1949 Chrysler Sedan automobile owned by the said S. W. Bowen, which policy is made a part hereof by reference.

Petitioner shows that on or about February 21, 1951, petitioner was invited by Mrs. S. W. Bowen, wife of assured, to be her guest to take a ride with her in the aforesaid Chrysler automobile, Mrs. Bowen then and there operating the car with the permission of assured.

The petitioner accepted said invitation; that said Mrs. S. W. Bowen took petitioner for a ride and after having completed the same, stopped her car across the street in front of the driveway of petitioner's home, being 234 Olive Street in the City of Shreveport, Parish of Caddo, Louisiana. [fol. 4] Petitioner shows that the said Mrs. S. W. Bowen stopped the car to permit petitioner to alight therefrom. Accordingly, petitioner proceeded to get out of the car, stepped on the ground and proceeded to close the right front door of the car. However, before petitioner could get the door fully closed and her hand removed from the handle, the said Mrs. S. W. Bowen suddenly and without warning, started her car forward, catching petitioner's coat sleeve in the handle of the car, dragging her and throwing her violently to the ground and injuring her as hereinafter set forth.

7

The accident and resulting injuries were caused proximately by the negligence of assured's wife, aforesaid, in the following non-exclusive particulars:

- a. Starting the car forward without first ascertaining that petitioner was free and clear thereof.
- b. Starting the car forward while petitioner was outside thereof but in physical contact therewith.
- c. Operating the car in a careless and reckless manner, under the circumstances.

8

Petitioner itemizes her injuries as follows:

- a. The large bone of her upper right leg was broken and crushed where it fits into the hip joint socket.
- b. Injuries of undetermined nature to the bones, muscles, nerves, blood vessels, tissues and cartilage of her

[fol. 5] 1. Upper back.

2. Lower back.

3. Both hips.

4. Both legs.

c. Aggravation and worsening of a preexisting but quiescent, dormant, non-disabling and non-painful arthritis and dislocated disc.

d. Bruises and contusions over entire body.

9

Petitioner was hospitalized from 21 February to 24 March 1951. Thereafter, she was confined to bed at her home for many months. As of now she is able to get about only with the aid of a cane.

10

She has undergone a particularly severe major operation in which an artificial, substitute bone head, made of plastic, has been fitted over the upper end of the large bone of her upper right leg. This artificial head articulates directly into her right hip joint socket.

11

She has had to have professional nursing care in and out of the hospital. Thereafter, she has had to have a non-professional attendant and will have to have such non-professional attendant the balance of her life.

12

She has suffered and will continue to suffer excruciating pain for the balance of her life.

[fol. 6]

13

Prior to the accident, petitioner was a strong, vigorous, healthy woman, engaging in all normal social, housekeeping and recreational activities.

14

At the time of her accident she was $70\frac{2}{3}$ years of age, with a life expectancy of 8.13 years.

15

Petitioner is and will be permanently and totally disabled.

16

Petitioner itemizes her damages as follows:

Disability and loss of enjoyment and use of her physical functions to go about the normal activities of social, household and recreational life	\$25,000.00
Pain and suffering	15,000.00
Attendant at \$75.00 per month for 8.13 years	7,200.00
Medicine, drugs, special foods, at \$20.00 per month for 8.13 years	1,920.00
Hospital bills, accrued	673.05
Doctors bills, accrued	571.13
Nursing and attendant bills, accrued	1,114.38
Medicine, ambulances, drugs, special foods, etc., accrued	111.94
Total	\$51,590.50

[fol. 7] Wherefore, petitioner prays for service and citation, for jury trial of all issues, and for verdict and judgment in the sum of \$51,590.50, with legal interest from date hereof, and for all general, necessary and equitable relief, and for all costs.

Sgd. John M. Madison, Slattery Bldg., Shreveport, Louisiana. Sgd. Whitfield Jack, J. M., Johnson Bldg., Shreveport, Louisiana, Attorneys for Petitioner.

IN UNITED STATES DISTRICT COURT

MOTION FOR PRODUCTION OF DOCUMENTS AND NAMES OF WITNESSES—Filed January 3, 1952

Now, into court comes Lumbermen's Mutual Casualty Company, made defendant in the above entitled and numbered cause, and, reserving all rights under the exceptions and motions heretofore filed, and, appearing herein solely for the purpose of this motion, with respect shows:

1

That your defendant is unaware of the names and addresses of any witnesses to the occurrence of the accident out of which this suit arises other than the plaintiff and Mrs. Maggie Rodgers Bowen and, in order for your defendant to properly prepare for the defense of this action, they should be advised as to the names and addresses of all witnesses known by the plaintiff or by plaintiff's attorneys.

2

That the plaintiff and plaintiff's attorneys have copies of medical reports reflecting the condition of the injuries and alleged disabilities of the plaintiff for which damages are being sought and in the proper preparation for the defense of this action your defendant should be furnished copies of such medical reports.

Wherefore, appearer prays that, after due consideration hereof, an order be entered herein directing the plaintiff and her attorney to furnish and submit to your appearer the

names and addresses of all witnesses having any knowledge concerning the occurrence of this accident or the alleged injuries and disabilities suffered by the plaintiff as the result thereof; and that they be further ordered to furnish your defendant with copies of all medical reports reflecting the condition and the injuries suffered by plaintiff.

Appearer further prays for all orders necessary for general and equitable relief.

Jackson, Mayer & Kennedy, Attorneys for Lumbermen's Mutual Casualty Company. Sgd. by Chas. L. Mayer, 1030 Giddens-Lane Building, Shreveport, Louisiana, Trial Attorney.

[File endorsement omitted.]

[fol. 9] IN UNITED STATES DISTRICT COURT

MOTION TO DISMISS—Filed January 3, 1952

Now into Court, comes Lumbermen's Mutual Casualty Company, made defendant in the above entitled and numbered cause, and reserving all rights under the motions and pleadings heretofore filed, with respect shows:

1

The complaint filed herein fails to state a claim against your defendant upon which relief can be granted.

2

This action as against your defendant is instituted by the plaintiff under and by virtue of the provisions of the Louisiana Revised Statutes 22:655. The provisions of said statute are procedural and are, therefore, not applicable herein.

3

That Mrs. S. W. Bowen is a resident of the State of Louisiana and plaintiff is a resident of the same state and there is no diversity of citizenship between the plaintiff and the party alleged to have committed the tort sued upon.

Wherefore, your defendant prays that, after due consideration hereof, this motion to dismiss be sustained.

Jackson, Mayer & Kennedy, Attorneys for Lumbermen's Mutual Casualty Company, Sgd. by Chas. L. Mayer, Trial Attorney, 1030 Giddens-Lane Building, Shreveport, Louisiana.

[File endorsement omitted.]

[fol. 10] IN UNITED STATES DISTRICT COURT

MOTION BY DEFENDANT TO STRIKE PLAINTIFF'S DEMAND FOR JURY TRIAL—Filed January 3, 1952

Now Into Court comes Lumbermen's Mutual Casualty Company, made defendant in the above entitled and numbered cause, and reserving all rights under the exceptions and motions heretofore filed and appearing herein solely for the purpose of this motion, with respect shows:

1

That the plaintiff herein has demanded a trial by jury of all issues.

2

That the action which has been instituted is a direct action against an insurer under and by virtue of certain statutory provisions of the State of Louisiana.

3

That under the common law there is no such direct right of action.

4

That the right of trial by jury does not exist under the constitution or statutes of the United States in matters as presented in the instant action.

5

That defendant's time to answer or otherwise move with respect to the complaint under Rule 12 of the Rules of

Civil Procedure should be extended to the disposition of this [fol. 11] motion.

Wherefore, appearer prays that, after due proceedings had, this motion be sustained and that the demand for trial by jury of all issues made by the plaintiff herein be disallowed.

Jackson, Mayer & Kennedy, Attorneys for Lumbermen's Mutual Casualty Company, Sgd. By Chas. L. Mayer, 1030 Giddens-Lane Building, Shreveport, Louisiana, Trial Attorney.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

MINUTES OF THE COURT—Filed February 22, 1952

This case came on for hearing on motion to strike jury demand; for production of documents and names of witnesses, and motion to dismiss for failure to state a claim, which were taken up.

Attorney for plaintiff stated that the motion for production had been complied with. The motion to strike demand for jury by defendant was overruled, and the Court [fol. 12] reserved a ruling on the motion to dismiss, and it was taken under advisement. At the request of Mr. Jack, the case was tentatively set for trial on March 19, 1952, pending the ruling on the motion to dismiss.

It was ordered that the Court be adjourned.

IN UNITED STATES DISTRICT COURT

ANSWER—Filed March 3, 1952

Now comes Lumbermen's Mutual Casualty Company, made defendant in the above entitled and numbered cause, and, reserving all rights under the exceptions and motions heretofore filed, with respect shows:

1

The allegations of paragraph 1 are denied for lack of sufficient information to justify a belief in same.

2

The allegations of paragraph 2 are admitted.

3

The allegations of paragraph 3 are denied.

4

The allegations of paragraph 4 are denied, except it is admitted that Lumbermen's Mutual Casualty Company issued a policy of public liability insurance to S. W. Bowen [fol. 13] and that said contract was in full force and effect and in all other respects your defendant shows that the contract of insurance is the best evidence as to the contents and provisions thereof.

5

The allegations of paragraph 5 are denied, except it is admitted that on the date referred to therein Mrs. S. W. Bowen was using said vehicle with the knowledge and consent of her husband and that petitioner had been riding in said vehicle. Your defendant shows that petitioner was being transported for the convenience and benefit of petitioner.

6

The allegations of paragraph 6 are denied.

7

The allegations of paragraph 7 are denied.

8

The allegations of paragraph 8 are denied for lack of sufficient information to justify a belief in same.

9

The allegations of paragraph 9 are denied for lack of sufficient information to justify a belief in same.

10

The allegations of paragraph 10 are denied for lack of sufficient information to justify a belief in same.

11

The allegations of paragraph 11 are denied for lack of sufficient information to justify a belief in same.

[fol. 14]

12

The allegations of paragraph 12 are denied for lack of sufficient information to justify a belief in same.

13

The allegations of paragraph 13 are denied for lack of sufficient information to justify a belief in same.

14

The allegations of paragraph 14 are denied for lack of sufficient information to justify a belief in same.

15

The allegations of paragraph 15 are denied.

16

The allegations of paragraph 16 are denied.

17

Further answering your defendant shows that the sole proximate cause of the accident out of which this suit arises was the negligence of the plaintiff, Mrs. Florence R. Elbert, in that she failed to maintain proper care and look-out for her own safety and in failing to use due care and caution in removing herself from the immediate proximity of the Bowen automobile, although she was fully aware of the fact that the vehicle was to be started in motion, and she was further negligent in failing to immediately notify the driver of the Bowen car that her clothing had become entangled in said vehicle if it should appear that the clothing had become so entangled.

18

[fol. 15] In the alternative and in the event the Court should find that the driver of the Bowen car was guilty of negligence which was a proximate cause of this accident,

then in that event your defendant shows that the negligence of the plaintiff as hereinabove outlined constituted contributory negligence such as bars recovery herein.

Wherefore, your defendant prays that, after due proceedings had, there be judgment rendered herein in favor of your defendant, Lumbermen's Mutual Casualty Company and against the plaintiff, Mrs. Florence R. Elbert, rejecting plaintiff's demands and dismissing this suit at plaintiff's costs. Defendant further prays for all orders necessary for general and equitable relief.

Jackson, Mayer & Kennedy, Attorneys for Lumbermen's Mutual Casualty Company, (Sgd.) By Chas. L. Mayer, 1030 Giddens-Lane Building, Shreveport, Louisiana, Trial Attorney.

[File endorsement omitted.]

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN
DISTRICT OF LOUISIANA, SHREVEPORT DIVISION

[fol. 16] Civil Action. No. 3548

MRS. FLORENCE R. ELBERT

v.

LUMBERMEN'S MUTUAL CASUALTY COMPANY

For Plaintiff: Messrs. John M. Madison, Slattery Building, Shreveport, Louisiana. Whitfield Jack, Johnson Building, Shreveport, Louisiana.

For Defendant: Charles L. Mayer, Jackson, Mayer & Kennedy, Giddens-Lane Building, Shreveport, Louisiana.

OPINION—September 3, 1952

DAWKINS, J.:

Plaintiff, a citizen of Louisiana, invoking the jurisdiction of this court solely upon the ground for diverse citizenship, sues defendant, a "corporate citizen of the State of Illinois", in tort, and for cause of action alleges:

"Petitioner shows that at all times herein mentioned the defendant had issued, and there was in full force

and effect, a policy of public liability insurance issued by the defendant to S. W. Bowen, 147 Boulevard Street, Shreveport, Louisiana, by the terms of which the defendant insured and indemnified and agreed to hold [fol. 17] harmless the said S. W. Bowen, the members of his household, including his wife, and others operating the below described automobile with his permission, as provided for in said policy, from all claims of judgment arising out of the negligent operation of one certain 1949 Chrysler Sedan automobile owned by the said S. W. Bowen, which policy is made a part hereof by reference.

"Petitioner shows that on or about February 21, 1951, petitioner was invited by Mrs. S. W. Bowen, wife of assured, to be her guest to take a ride with her in the aforesaid Chrysler automobile, Mrs. Bowen then and there operating the car with the permission of assured.

"That petitioner accepted said invitation; that said Mrs. S. W. Bowen took petitioner for a ride and after having completed the same, stopped her car across the street in front of the driveway of petitioner's home, being 234 Olive Street in the City of Shreveport, Parish of Caddo, Louisiana. Petitioner shows that the said Mrs. S. W. Bowen stopped the car to permit petitioner to alight therefrom. Accordingly, petitioner proceeded to get out of the car, stepped on the ground and proceeded to close the right front door of the car. However, before petitioner could get the door fully closed and her hand removed from the handle, the said Mrs. S. W. Bowen suddenly and without warning, [fol. 18] started her car forward, catching petitioner's coat sleeve in the handle of the car, dragging her and throwing her violently to the ground and injuring her as hereinafter set forth.

"The accident and resulting injuries were caused proximately by the negligence of assured's wife, aforesaid, in the following non-exclusive particulars:

"a. Starting the car forward without first ascertaining that petitioner was free and clear thereof.

“b. Starting the car forward while petitioner was outside thereof but in physical contact therewith.

“c. Operating the car in a careless and reckless manner, under the circumstances.

“Petitioner itemizes her injuries as follows:

“a. The large bones of her upper right leg was broken and crushed where it fits into the hip joint socket.

“b. Injuries of undetermined nature to the bones, muscles, nerves, blood vessels, tissues and cartilage of her

“1. Upper back.

“2. Lower back.

“3. Both hips.

“4. Both legs.

[fol. 19] “c. Aggravation and worsening of a pre-existing but quiescent, dormant, non-disabling and non-painful arthritis and dislocated disc.

“d. Bruises and contusions over entire body.”

Her prayer is for judgment in the total sum of \$51,590.50, which includes “loss of enjoyment and use of physical functions * * * pain and suffering * * * expenses of an attendant * * * medicine, drugs and special foods * * * hospital bills * * * doctors bills * * * nursing and attendant bills accrued.” There is nothing alleged to show whether the maximum coverage of the policy is more or less than the total amount claimed.

Defendant has moved to dismiss the complaint, contending there is no diversity of citizenship between the real parties to the controversy as to whose fault or negligence caused the alleged injuries and consequent damages.

The sole basis for invoking the jurisdiction of the Federal court here is in the Act No. 55 of Louisiana Legislature of 1930 (now Act 541 of 1950), which reads as follows:

“No policy or contract of liability insurance shall be issued or delivered in this state, unless it contains provisions to the effect that the insolvency or bankruptcy of the insured, shall not release the insurer

from the payment of damages for injuries sustained or loss occasioned during the existence of the policy, and any judgment which may be rendered against the insured for which the insurer is liable which shall [fol. 20] have become executory, shall be deemed prima facie evidence of the insolvency of the insured, and an action may thereafter be maintained within the terms and limits of the policy by the injured person, or his or her heirs against the insurer. The insured person or his or her heirs, at their option, shall have a right of direct action against the insurer within the terms and limits of the policy in the parish where the accident or injury occurred or in the parish where the insured has his domicile, and said action may be brought against the insurer alone or against both the insured and the insurer, jointly and in solido. This right of direct action shall exist whether the policy of insurance sued upon was written or delivered in the State of Louisiana or not and whether or not such policy contains a provision forbidding such direct action, provided the accident or injury occurred within the State of Louisiana. Nothing contained in this section shall be construed to affect the provisions of the policy or contract if the same are not in violation of the laws of this state. It is the intent of this section that any action brought hereunder shall be subject to all of the lawful conditions of the policy or contract and the defenses which could be urged by the insurer to a direct action brought by the insured, provided the terms and conditions of such policy or contract are not in violation of the laws of this state."

[fol. 21] As appears from the fourth article of the complaint quoted above, the policy sued upon was not one of general liability in favor of the public, or any person who might have a claim in tort against the insured growing out of the use of the automobile covered. Nor did the insurer undertake to defend any such action against its insured, but, according to the complaint, "by the terms of the policy" the defendant undertook to "indemnify and agreed to hold harmless the said" insured and all others covered by the

policy "from the claims or charges arising out of the negligent operation of the automobile involved."

OPINION

This is one of a large number of similar suits filed in this District, which has doubled the work in the Western District within the past few years, all by citizens of Louisiana alleging that the controversy is between citizens of different states. Here, as in the others, the insured are citizens of Louisiana the same as the plaintiffs. All of them present the question of whether the State Legislature can, by authorizing a direct action against the insurer alone, at the option of complainant, impose jurisdiction upon the Federal courts in a controversy which primarily and fundamentally is one between its own citizens. The cause of action or controversy in all suits in tort in this state arises exclusively from the provisions of Article 2315 of the Louisiana Civil Code, which is also quoted in full:

"Every act whatever of man that causes damage to another, obliges him by whose fault it happened to repair it; the right of this action shall survive in case of death in favor of the children, including adopted [fol. 22] children, or spouse of the deceased, or either of them, and in default of these in favor of the surviving father and mother or either of them, and in default of any of the above persons, then in favor of the surviving brothers and sisters, or either of them, for the space of one year from the death; provided that should the deceased leave a surviving spouse, together with minor children, the right of action shall accrue to both the surviving spouse and minor children; provided further, that the right of action shall accrue to the major children only in those cases where their (there) is no surviving spouse or minor child or children.

"If the above right of action exists in favor of an adopted person, such right of action shall survive in case of death in favor of the children or spouse of the deceased, or either of them, and in default of these in favor of the surviving adoptive parents, or either of them, and in default of any of the above persons,

then in favor of the surviving children of the adoptive parents, or either of them, and in default of these in favor of the surviving father and mother of the adopted person, or either of them, and in default of these, then in favor of the surviving brothers and sisters of the adopted person, or either of them, for the space of one year from the death.

“The survivors above mentioned may also recover the [fol. 23] damages sustained by them by the death of the parent or child or husband or wife or brothers or sisters or adoptive parent, or parents, or adopted person, as the case may be. (As amended by Acts 1932, No. 159)”.

In express terms therefore, only those whose fault causes the injury can be made to repair it. But by no stretch of the imagination can the insurer or indemnitor be said to have had any part in the tortious acts alleged in this or any other case. His undertaking is purely a matter of contract with his insured.

The jurisdiction of this court in diversity cases is conferred by the Federal Constitution and Statute. Section 2 of Article III of the Constitution provides:

“The judicial power shall extend to * * * *controversies* * * * *between citizens of different states* * * *”;

and Subsection (a) of Section 1332 of Title 28, U.S.C. declares:

“The district court shall have original jurisdiction of all civil actions *where the matter in controversy is between*:

“(1) citizens of different states’ ”. (Emphasis by the writer.)

To say that the Legislature of a state can confer jurisdiction upon a Federal court in a controversy which otherwise obviously it does not have, would be to concede to that body a function belonging alone to the National Congress by the simple expedient of a legislative declaration that the plain-[fol. 24] tiff, in a tort action, may sue the insurer directly and alone, in total disregard of the valid agreement between

the insured and the insurer that this should not be done, by using the accident of diverse citizenship between the complainant and the insurance company. The vast majority of insurance companies writing this kind of insurance in Louisiana are citizens of other states, and the statute otherwise provides that all provisions of the policy, other than the "no action" clause, shall be preserved and apply in any such direct action against the insurer. Liability insurance, except as to commercial operators, is not compulsory, and where the tortfeasor has none, the injured person has no alternative but to sue his fellow citizen in the State court.

In *Indianapolis et al v. Chase National Bank*, 314 U. S. 63 the Bank, a citizen of New York, sued the Indianapolis Gas Company, the Citizens' Gas Company and the City of Indianapolis, all citizens of Indiana. The question involved was the validity of a lease by Indianapolis Gas Company to Citizens' Gas Company, insofar as the rights of the City, assignee, were concerned, since it had ultimately acquired the gas properties. It was found that inasmuch as the Indianapolis Gas Company, a citizen of the same state as the other two defendants, had to be aligned on the side of the plaintiff Bank, there was no jurisdiction in the Federal Court. The language used in emphasizing the necessity for determining the real controversy involved and the positions of the opposing parties to that controversy, it is believed has equal and forceful application to the present case. The Court first found that the lease "is primarily the controlling matter in dispute". The rest is window [fol. 25] dressing, designed to satisfy the requirements of diversity jurisdiction".

That court had previously denied certiorari when the Court of Appeals had reversed the District Court in dismissing the case for lack of jurisdiction. When it went back, after trial on the merits, the District Court rendered judgment against Indianapolis Gas Company alone, but the Court of Appeals again reversed and held the other two, the Citizens' Company and the City, liable, along with the Indianapolis Company, for the interest on the bonds which the Bank was endeavoring to collect.

After stating the pleadings and issues requiring the alignment of Indianapolis Gas Company on the side of the Bank and against the other two defendants, the court first

stated, in referring to its former refusal of certiorari, that "of course, this court, by its denial of certiorari when the case was here the first time, *could not confer the jurisdiction which Congress has denied*" (emphasis by the writer.)

In dealing with the necessity for diversity on the real issue or controversy, the court said:

"To sustain diversity jurisdiction there must exist an 'actual,' *Helm v. Zarecor*, 222 U. S. 32, 36, 'substantial,' *Niles-Bement-Pond Co. v. Iron Moulders Union*, 254 U. S. 77, 81, controversy between citizens of different states, all of whom on one side of the controversy are citizens of different states from all parties on the other side. *Strawbridge v. Curtiss*, 3 Cranch 267. Diversity jurisdiction cannot be conferred upon the federal courts by the parties' own determination of who are plaintiffs and who defendants. It is our duty, as it is that of the lower federal courts, to 'look beyond the pleadings and arrange the parties according to their sides in the dispute.' *Dawson v. Columbia Trust Co.*, 197 U. S. 178, 180. Litigation is the pursuit of practical ends, not a game of chess. Whether the necessary 'collision of interests,' *Dawson v. Columbia Trust Co.*, *supra*, at 181 exists, is therefore not to be determined by mechanical rules. It must be ascertained from the 'principal purpose of the suit,' *East Tennessee, V. & G. R. v. Grayson*, 119 U. S. 240, 244, and the 'primary and controlling matter in dispute,' *Merchants' Cotton Press Co. v. Insurance Co.*, 151 U. S. 368, 385".

In holding that the actual controversy required the alignment of Indianapolis Gas Company with the Bank, the court further stated:

"This is not a sacrifice of justice to technicality. For the question here is not whether Chase and Indianapolis Gas may pursue what they conceive to be just claims against the City, but whether they may pursue them in the federal courts in Indiana, rather than in its state courts. The fact that Chase prefers the adjudication of its claims by the federal court is certainly no reason why we should deny the plain facts of the con-

troversy and yield to illusive artifices. Settled re-[fol. 27] strictions against bringing local disputes into the federal courts cannot thus be circumvented.

“These requirements, however technical seeming, must be viewed in the perspective of the constitutional limitations upon the judicial power of the federal courts, and of the Judiciary Acts in defining the authority of the federal courts when they sit, in effect, as state courts. See *Madisonville Traction Co. v. Mining Co.*, 196 U. S. 239, 255, and *Ex parte Schollenberger*, 96 U. S. 369, 377. The dominant note in the successive enactments of Congress relating to diversity jurisdiction, is one of jealous restriction, of avoiding offense to state sensitiveness, *and of relieving the federal courts of the overwhelming burden of ‘business that intrinsically belongs to the state courts,’ in order to keep them free for their distinctive federal business.* See Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 Harv. L. Rev. 483, 510; *Shamrock Oil Corp. v. Sheets*, 313 U. S. 100, 108-109; *Healy v. Ratta*, 292 U. S. 267, 270. ‘The policy of the statute (Conferring diversity jurisdiction upon the district courts) calls for its strict construction. The power reserved to the states, under the Constitution, to provide for the determination of controversies in their courts may be restricted only by the action of Congress in conformity [fol. 28] to the judiciary sections of the Constitution . . . Due regard for the rightful independence of state governments, which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which the statute has defined.’ *Healy v. Ratta*, *supra*, at 270. In defining the boundaries of diversity jurisdiction, this Court must be mindful of this guiding Congressional policy. See *Hepburn & Dundas v. Ellzey*, 2 Cranch 445; *New Orleans v. Winder*, 1 Wheat. 91; *Morris v. Gilmer*, 129 U. S. 315, 328-29; *Coal Company v. Blatchford*, 11 Wall. 172, *Shamrock Oil Corp. v. Sheets*, 313 U. S. 100; and compare *Old Grant v. M’Kee*, 1 Pet. 248; *Elgin v. Marshall*, 106 U. S. 578; *Healy v. Ratta*, 292 U. S. 263; *McNutt v. General Motors Acceptance Corp.*, 298 U. S. 178.” (Emphasis by the Writer)

In the present case there is no separate controversy between the plaintiff and the insurance company as to its liability within the amount of its policy, once that liability on the part of the insured has been established. Until that is done, the cause of action created by Article 2315 of the Civil Code, in favor of the plaintiff, growing out of the fault constitute the "primary and controlling matters in dispute." It is true that the Court of Appeals in this Circuit, in *Fisher et al. v. Home Indemnity Co.*, No. 13,810, decided June 30, 1952, held that the Act 55 of 1930, insofar as the insurer is concerned, deals with a substantial right in making it alone subject to a direct action without the [fol. 29] presence of its insured in the case; but that was because the Act seeks to deprive the insurer of a property right under its written contract, valid where made, in violation of the Federal Constitution, and not because either that statute or Article 2315 has made it a party, within the meaning of the Federal Diversity Laws, and the only controversy involved here is whether its insured was guilty of negligence which proximately caused the damage, a matter which the insured and insurer expressly agreed should be first determined between the former and third persons claiming the right to sue in tort. See also *Lake et al v. Texas News Co.*, 51 F. 2d 862; *Haenni v. Craven et al.*, 56 F. 2d 261; *Cothran v. Hackel et al.*, 56 F. 2d 263; and *Behling v. Rivers et al.*, 74 F. Supp. 350.

See especially *State Farm Mutual Automobile Ins. Co. vs. Hugoe* (4 Cir.) 115 F. 2d 298, 132 A.L.R. 188, *Maryland Casualty Co. v. Boyle Construction Co., Inc., et al.* (4 Cir.) 123 F. 2d 558; *Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 312 U. S. 270.

Among the cases cited by the plaintiff to sustain jurisdiction in this and the companion case of *Nelson v. Clyde T. Gasperson et al.*, No. 3232 on the docket of this court, and also relied on rather heavily by the Court of Appeals for this Circuit in *New Amsterdam Casualty Co. v. Soileau*, 167 F. 2d 767, is that of *Merchants Mutual Automobile Liability Insurance Co. v. Smart*, 267 U. S. 126. The syllabus of that case is quoted as follows:

"A state law (N. Y. Laws 1918, c. 182) required that any policy issued by an insurance corporation, in the

future, to indemnify the owner of a motor vehicle against liability to persons injured through negligence in its operation, shall provide that the insolvency or bankruptcy of the insured shall not release the company from payment of damages for an injury sustained during the life of the policy, *and that, in case execution against the insured in an action brought by a person so* [fol. 30] *injured shall be returned unsatisfied because of such insolvency or bankruptcy, the injured person may maintain an action against the company on the policy for the amount of the judgment not exceeding the amount of the policy.*

“Held: (1) That the regulation is reasonable, and within the police power; it cannot be said to deprive the Insurance Company of property without due process of law. * * *” (Emphasis by the writer).

It thus appears that the statute of New York there involved, unlike the present Louisiana Law, required that the controversy between the injured person and the alleged tortfeasor be determined before the injured person could sue the insurer. The primary controversy between those persons there had been decided and no longer remained an issue. The only question left was the obligation of the insurer to indemnify or protect the insured, which the State Law declared should inure to the benefit of the injured person. Nothing was left to the insurer as a defense except the matters which it pleaded and these did not require the presence of the insured as a party. It is well to note also that the case had been filed in the State Court after judgment against the tortfeasor was affirmed by the State Supreme Court and the matter went to the United States Supreme Court under Section 237 of the Judicial Code. The court found that “the regulation was reasonable and within the police power; it cannot be said to deprive the insurance company of property without due process of law.” (The New York statute was substantially the same as Act 253 of 1918 before it was amended to permit a direct action against the insurer by Act 55 of 1930.) On [fol. 31] the other hand, as stated above, the Court of Appeals in this Circuit, in *Fisher v. Home Indemnity Co.*, supra, has held that the Louisiana direct action statute,

which attempts to nullify stipulations in policies valid where made, by providing that the injured person, at his option, may sue the insurer directly and alone, does violate due process and the prohibition of the Federal Constitution against depriving persons of their property arbitrarily.

In discussing conditions arising from the increasing menace to life, limb and property from high-powered motor vehicles (which is now much worse than in 1924 when the decision was rendered), Chief Justice Taft said:

"It is well settled that the business of insurance is of such a peculiar character, affects so many people and is so intimately connected with the common good that the State creating insurance corporations and giving them authority to engage in that business may, without transcending the limits of legislative power, regulate their affairs so far at least as to prevent them from committing wrongs or injustice in the exercise of their corporate functions. *Northwestern Life Insurance Company v. Riggs*, 203 U. S. 243, 254; *Whitfield v. Aetna Life Insurance Company*, 205 U. S. 489, *German Alliance Insurance Company v. Kansas*, 233 U. S. 389, 412, et seq.; *La Tourette v. McMaster*, 248 U. S. 465, 467; *National Insurance Company v. Wanberg*, 260 U. S. 71, 73. Such regulation would seem [fol. 32] to be peculiarly applicable to that form of insurance which has come into very wide use of late years, that of indemnifying the owners of vehicles against losses due to the negligence of themselves or their servants in their operation and use. The agencies for the promotion of comfort and speed in the streets are so many and present such possibility of accident and injury to members of the public that the owners have recourse to insurance to relieve them from the risk of heavy recoveries they run in entrusting these more or less dangerous instruments to the care of their agents. *Having in mind the sense of immunity of the owner protected by the insurance and the possible danger of a less degree of care due to that immunity*, it would seem to be a reasonable provision by the State in the interest of the public, whose lives and limbs are exposed, to require that the owner in the

contract indemnifying him against any recovery from him should stipulate with the insurance company that the indemnity by which he saves himself should certainly inure to the benefit of the person who thereafter is injured. Section 109 does not go quite so far. It provides that the subrogation shall take place only when the insured proves insolvent or bankrupt, and leaves the injured person to pursue his judgment against the insured if solvent without reliance on the policy.

[fol. 33] "Another reason for the legislation is suggested in the opinion of the Appellate Division of the Supreme Court of New York (*Roth v. National Automobile Mutual Casualty Company*, 202 N. Y. App. Div. 667, 674, to wit, that it was enacted on the recommendation of the State Superintendent of Insurance *to make impossible a practice of some companies to collude with the insured after an injury foreshadowing heavy damages had occurred, and to and to secure an adjudication of the insured in bankruptcy whereby recovery on the policy could be defeated because the bankrupt had sustained no loss.*

"Whatever the especial occasion for the enactment, it is clear that the exercise of the police power in passing it was reasonable and can not be said to deprive the Insurance Company of property without due process of law. It is to be remembered that the assumption of liability by the Insurance Company under Section 109 is entirely voluntary. It need not engage in such insurance if it chooses not to do so." (Emphasis by the Writer.)

If the court can take notice, as it did there, of the possibilities of collusion and fraud between the insurance company and its insured, no reason can be seen why the other side of the picture should not be recognized. This court had occasion a few months ago to try a case in which the alleged tortfeasor (driver of a borrowed automobile) was the husband of one of the victims, a son-in-law and brother-in-law to others, and the wife of the insured owner [fol. 34] of the car was an injured passenger in the vehicle also. All signed statements shortly after the accident, the

effect of which had been to practically eliminate any negligence on the part of the driver. All of the passengers sued the insurer alone, but the driver, although injured, did not join therein for the reason that it was his alleged negligence upon which the complainants relied to recover. The defendant pleaded his failure to cooperate required as a condition of the policy, and it was only after the court had admonished him to tell the truth that he finally gave testimony in line with the statement which he made immediately after the accident. All of the others contradicted their former signed statements completely. The insurance company had no source for gaining information about the accident other than from the driver and the plaintiffs, passengers in the car. It would seem, therefore, that the danger of collusion between the insured and the injured persons is equally present and perhaps greater than between the insured and the insurer. If there is full coverage, or the prospect of collecting from the tortfeasor is not encouraging, the situation constitutes an open invitation to him to aid the claimants in mulcting the insurance company in consideration of their leaving him out of the case. I believe this matter requires a common sense consideration rather than a theoretical treatment *with* ignores the realities involved.

As to the cases cited as having been decided earlier by the writer, it is sufficient to say that, as frankly stated in *Bayard v. Traders & Gen. Ins. Co.*, 99 F. Supp. 343, and *Bish et ux. v. The Employers' Liability Assurance Corp. Ltd.*, 102 F. Supp. 343, after seeing the consequence of these former decisions and being convinced of the errors [fol. 35] committed, along with the injustice of the situation and the deluge of litigation which fell upon this court, the matter was reconsidered and subsequent cases have been decided in accordance with what is believed to be correct principles of law. This judge has been substantially sustained in some of the changed views expressed in subsequent cases by the Court of Appeals for this Circuit in *Fisher v. Home Indemnity Co.*, *supra*.

In *New Amsterdam Casualty Co. v. Soileau*, 167 F. 2d. 767, the Court cited and relied upon the *Merchants Mutual Automobile Liability Ins. Co. v. Smart*, *supra*, which, for the reasons stated above, it is believed can clearly be distinguished from both the *Soileau* case and the present one

in that the original and true controversy between citizens of the same state had been settled by judgment of the State Court, leaving only the issue of the insurance company's liability under the terms of its policy. The fact that certiorari was denied did not mean that the Supreme Court approved the Soileau case, as is clearly disclosed by what happened in *Indianapolis v. Chase National Bank*, *supra*.

As to *City of New Orleans v. Whitney*, cited in the Soileau case as appearing on page 595 of 138 U. S., I am unable to find a case of that title, but there does appear in that volume and page the case of *New Orleans v. Gaines, Administrator*, and the reverse of that title. That was a case involving the rents and revenues of real property and stemming from the implied warranty which the Civil Code imposes upon all vendors when not expressly waived. In addition, there were express subrogations to support the action of the complainant. The court quoted from a former decision of the same matter in which it had been said as follows:

[fol. 36] “ ‘As between the city and its grantee, the former by reason of its guaranty of title, is really the principal debtor, and bound to protect the grantee as a principal is bound to protect his surety. Therefore the grantee is entitled to such remedies as a surety hath; and when fixed judgment, if not before, may file a bill against his guarantor to protect him.’ ” (Emphasis by the writer).

It is believed there was little analogy between that case and the Soileau case. Of course, there had not been in the Soileau case, nor has there been here, any express subrogation or reduction to judgment of the claim. In fact, it arises, if at all, solely from the court's interpretation of the statute as having the effect of a legal subrogation in favor of the injured person of the rights of the insured against his insurer. It cannot be seen how such a subrogation could be created of a part only of those rights, the suing of the insurer alone, without imposing also the obligation to first liquidate the claim with the insured. Just as in *Merchants Automobile Liability Ins. Co. v. Smart*, *supra*, the claim in *Gaines* had been established against the obligor.

American Surety Co. v. Louis State Bank, 8 F. 2d 559,

is not at all similar to the present case. There the non-resident surety, who sued to be reimbursed, had paid its bond and taken a formal subrogation from its principal, the State. The court upheld the jurisdiction in an action by the surety against the Bank, based upon its negligence. The remaining cases of the Fifth Circuit seem to be distinguishable for similar reasons.

[fol. 37] For the reasons indicated, the motion to dismiss should be sustained.

Proper decree should be presented.

Done and signed in Chambers, at Monroe, Louisiana, this 3d day of September, 1952.

Sgd. Ben C. Dawkins, Judge.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

MOTION FOR REHEARING ON DEFENDANT'S MOTION TO DISMISS—Filed September 13, 1952

Now comes complainant and moves this Court for a rehearing on defendant's Motion to Dismiss and this Court's written opinion dated 3 September 1952, filed 4 September 1952, sustaining that Motion, and finally for an order granting a rehearing thereon and denying said Motion, in view of the unreported opinion in *Gushing v. Maryland Casualty Company*, decided by the Fifth Circuit on appeal from the Eastern District of Louisiana.

Wilkinson, Lewis & Wilkinson, Sgd. by John M. Madison, W.J. Booth, Lockard & Jack, Sgd. by [fol. 38] Whitfield Jack, attorneys for complainant.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

STIPULATION RE RESIDENCE OF PARTIES—Filed September 27, 1952

It is stipulated between complainant, through undersigned counsel, and defendant, through undersigned counsel, as follows:

a. Complainant and assured were both citizens of and residing within the State of Louisiana at the time the policy sued upon was applied for, at the time that the policy sued upon was issued, and at the time of the accident which forms the basis of this suit, and both of said parties are still citizens of and living in Louisiana.

b. Defendant is now a citizen of Illinois, authorized and doing business in Louisiana, and was such and so authorized when the policy sued upon was applied for and issued and when the said accident occurred.

c. The application for and the issuance of the insurance policy sued upon occurred in Louisiana.

d. The accident which gives rise to this suit occurred in Louisiana.

[fol. 39] e. Attached hereto and made a part hereof is a true and correct photostatic copy of the policy sued upon.

This stipulation agreement is made to be filed in the records of this case and to be binding upon the complainant and defendant.

Wilkinson, Lewis & Wilkinson, Sgd. by John M. Madison, Slattery Bldg., Shreveport, La.; Booth, Lockhard & Jack, Sgd. by Whitfield Jack, Johnson Bldg., Shreveport, La., attorneys for complainant; Jackson, Mayer & Kennedy, Sgd. by Charles L. Mayer, Giddens Lane Bldg., Shreveport, La., attorneys for defendant.

[File endorsement omitted.]

Note: Photostat copy of insurance policy attached to Stipulation Filed September 27, 1952 is being sent up in its original form.

IN UNITED STATES DISTRICT COURT

MINUTES OF THE COURT—September 29, 1952

[fol. 40] This case came on for hearing on plaintiff's motion for re-hearing on defendant's motion to dismiss. The motion was argued, submitted and is to be taken under advisement. A short memorandum will be furnished by the defense attorney.

Court ordered adjourned.

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN
DISTRICT OF LOUISIANA, SHREVEPORT DIVISION

• • • • •

Civil Action

No. 3548

MRS. FLORENCE R. ELBERT

v.

LUMBERMAN'S MUTUAL CASUALTY COMPANY

• • • • •

For plaintiff: Messrs. John M. Madison, Slattery Building, Shreveport, Louisiana; Whitfield Jack, Johnson Building, Shreveport, Louisiana.

For defendant: Charles L. Mayer, Jackson, Mayer & Kennedy, Giddens-Lane Building, Shreveport, Louisiana.

• • • • •

DAWKINS, J.:

OPINION ON MOTION FOR REHEARING—October 30, 1952

Plaintiff has sought a rehearing in this case because of the decision of the Court of Appeals for this Circuit in Cushing et al. v. Maryland Casualty Company, No. 13,887, decided on July 31, 1952.

In that case, jurisdiction was invoked under both Section 33 of the Merchant Marine (Jones) Act of 1920, and Section 655 of Title 22 of the Louisiana Revised Statutes, usually called the direct action law. The suits were by the beneficiaries of deceased seamen who lost their lives in a collision by a tug owned by their employer with a railroad bridge belonging to the Texas & Pacific Railway Company. Defendants were the Railroad and the insurers, alone, against liability of the owners of the tug for injury and death of seamen. This insurance policy also covered death by accidental means and applied solely to the employees of the owner of the tug. The complainants charged negligence on the part of the operators of both the tug and the bridge.

The trial court sustained a motion to dismiss the demands against the insurance companies under the State Direct Action Statute, on the ground that the matter was cognizable solely, in admiralty jurisdiction and the State [fol. 42] law did not apply. The Court of Appeals reversed that ruling, stating the issues as follows:

“The dominant question is whether or not the statute (Sec. 655 La. Rev. Stat. of 1950) applies to policies which protect the owner and charterer of a vessel against liability for *personal injuries or accidental death suffered by the crew of a vessel in navigable waters.*” (Emphasis by the writer.)

In disposing of the case, the Court, among other things, said:

“While Sec. 655, *supra*, confers upon an injured party a *substantive* right which becomes vested at the moment of the injury, it is not a right essentially maritime in character * * *. The statute provides *only an additional and cumulative remedy* at law in the enforcement of obligations of indemnity voluntarily and lawfully assumed by the insurer” and that it “does not conflict with any feature of substantive admiralty law, nor with any *remedy* peculiar to admiralty jurisdiction. These suits are at law, not in admiralty.” (Emphasis by the writer.)

It is hard to understand how a law can confer "a substantial right" and yet provide "*only* an additional and cumulative remedy." In *Fisher v. Home Indemnity Company*, decided June 30, 1952, the same Court of Appeals, with Judge Hutcheson as its organ, had held that Sec. 655 created a substantial right, not a remedy, insofar as it attempted to give a direct action against the insurer alone, [fol. 43] the enforcement of which as to contracts validly made in other states would violate the Federal Constitution.

Further on in the *Cushing* case, it is said:

"Appellees, the insurers, further contend that the Jones Act, 46 E. S. C. A. 688, *creates a right of action against an injured seaman's employer, but not against the employer's liability underwriter*, and that the State of Louisiana can not add to the rights created by the Jones Act. It is unnecessary, however, to determine that question. Even if there were no jurisdiction, or any right of action, under the Jones Act, which we do not decide, diversity of citizenship exists between all plaintiffs and the defendant insurers, and more than \$3,000.00 is involved in each suit. *These circumstances support federal jurisdiction. The complaints contain averments which sufficiently assert liability upon general principles of negligence, and also for accidental death within the coverage of the policies sued upon, so that a cause of action is stated.*" (Emphasis by the writer.)

Actions for death were unknown to the common law. In Louisiana the right to sue for personal injuries or death is purely statutory, and the liability created is confined to the person or persons at fault. The insurer, or persons secondarily liable, are not included, nor does Sec. 655 purport to make it an additional tortfeasor. It simply authorizes the injured person or his heirs, at their option, to bring a direct proceeding against the insurer alone or against [fol. 44] the insurer and insured together on the one cause of action created by the Code, and otherwise specifically preserves all other terms of the policy. Therefore, any such suit by a third person against the insurer must necessarily arise from an implied subrogation to the rights of

the insured under his policy to demand of the insurer that it discharge his liability once it is established. Certainly the insured himself has no cause of action to sue his insurer until the controversy as to whose fault, under Art. 2315 of the Civil Code, caused the injury, is determined; nor can that right of action of the subrogee, the injured person, it would seem, rise any higher than that of the insured, that is, to require payment by the insurer of the judgment against the insured.

In *Maryland Casualty Co. v. Pacific Coal & Oil Co. et al.*, 312 U. S. 270, the court stated the circumstances as follows:

"Petitioner issued a conventional liability policy to the insured, the Pacific Coal & Oil Co., in which it agreed to indemnify the insured for any sums the latter might be required to pay to third parties for injuries to person and property caused by automobiles hired by the insured. Petitioner also agreed that it would defend any action covered by the policy which was brought against the insured to recover damages for such injuries.

"While the policy was in force, a collision occurred between an automobile driven by respondent Orteca and a truck driven by an employee of the insured. [fol. 45] Orteca brought an action in an Ohio State court *against the insured* to recover damages resulting from injuries sustained in this collision. Apparently this action has not proceeded to judgment.

"Petitioner then brought this action against the insured and Orteca. Its complaint set forth the facts detailed above and further alleged that the time of the collision the employee of the insured was driving a truck sold to him by the insured on a conditional sales contract. Petitioner claimed that this truck was not one 'hired by the insured' and hence that it was not liable to defend the action by Orteca against the insured or to indemnify the latter if Orteca prevailed. It sought a declaratory judgment to this effect against the insured and Orteca, and a temporary injunction restraining the proceedings in the state court pending final judgment in this suit." (Emphasis by the writer.)

Orteca demurred on the complaint on the ground that it did not "state a cause of action against him", which was sustained by the trial court and affirmed by the Court of Appeals in 11 Fed. 2d. 214. In disposing of the matter, the Supreme Court said:

"The question is whether petitioner's allegations are sufficient to entitle it to the declaratory relief prayed in its complaint. This raises the question whether there is an '*actual controversy*' within the meaning of the Declaratory Judgment Act (Judicial [fol. 46] Code § 274d, 28 U. S. C. § 400), since the District Court is without power to grant declaratory relief unless such a controversy exists. *Nashville, C. & St. L. Ry. Co. v. Wallace*, 288 U. S. 249, 259; U. S. C. A. Constitution, Art. III, § 2.

"The difference between an abstract question and a 'controversy' contemplated by the Declaratory Judgment Act is necessarily one of degree, and it would be difficult, if it would be possible, to fashion a precise test for determining in every case whether there is such a controversy. *Basically, the question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interest, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.* See *Aetna Life Ins. Co. v. Haworth*, 300 U. S. 227, 239-242. *It is immaterial that frequently, in the declaratory judgment suit, the positions of the parties in the conventional suit are reversed; the inquiry is the same in either case.* *Nashville C. & St. L. Ry. Co. v. Wallace*, *supra*, p. 261.

"That the complaint in the instant case presents such a controversy is plain. Orteca is now seeking a judgment against the insured in an action which the latter claims is covered by the policy, and §§ 9510-3 and 9510-4 of the Ohio Code (Page's Ohio General Code, Vol. 6, §§ 9510-3, 9510-4) give Orteca a statutory [fol. 47] right to proceed against petitioner by supplemental process and action if he obtains a final judgment against the insured which the latter does not satisfy within thirty days after its rendition. Com-

pare *Maryland Casualty Co. v. United Corporation*, 111 F. 2d. 443, 446; *Central Surety & Insurance Corp. v. Norris*, 103 F. 2d. 116, 117; *U. S. Fidelity & Guaranty Co. v. Pierson*, 97 F. 2d. 560, 562. Moreover, Orteca may perform the conditions of the policy issued to the insured requiring notice of the accident, notice of suit, etc., in order to prevent lapse of the policy through failure of the insured to perform such conditions. *Hartford Accident & Indemnity Co. v. Randall*, 125 Ohio St. 581; 183 N. E. 433; see also, *Lind v. State Automobile Mutual Insurance Assn.*, 128 Ohio St. 1; 190 N. E. 138; *State Automobile Mutual Insurance Assn. v. Friedman*, 122 Ohio St. 334; 171 N. E. 591.

"It is clear that there is an actual controversy between petitioner and the insured. Compare *Aetna Life Ins. Co. v. Haworth*, *supra*. If we held contrariwise as to Orteca because, as to him, the controversy were yet too remote, it is possible that opposite interpretations of the policy be announced by the federal and state courts. For the federal court, in a judgment not binding on Orteca might determine that petitioner was not obligated under the policy, while the state court, in a supplemental proceeding by Orteca [fol. 48] against petitioner, might conclude otherwise. Compare *Central Surety & Insurance Corp. v. Norris*, *supra*, p. 117; *Aetna Casualty & Surety Co. v. Yeatts*, 99 F. 2d. 665, 670." (Emphasis by the writer.)

Of course, the real controversy in that case, as between the insurer and the injured person, Orteca, was not whose fault caused the accident but whether the policy covered it as contended by both Orteca and the insured, and that was the sole basis upon which the Supreme Court rested its conclusion that a federal court had jurisdiction under the declaratory judgment statute (Sec. 400, Tit. 28 U.S.C.), between citizens of different states. Hence, without that issue of coverage, it seems clear that the court would have ruled otherwise. The effect of the decision is that the insurer could not have maintained the suit for declaratory judgment against Orteca alone upon the controversy as to liability between him and the insurer as such, without this

allegation of non-coverage, wherein it contended the terms of its policy did not obligate it to defend or to indemnify the insured under the facts which were charged in the complaint for the declaratory judgment. If the insurer in a suit wherein there was unquestioned diversity between it and the injured person could not maintain a cause of action independently and alone against the latter, because of the absence of any real controversy between it and the insured, how can it be said that the injured person could invoke federal jurisdiction against the insurer alone on the same state of facts? Could there be any "actual controversy" in the one instance and not in the other?

The Court of Appeals for the Fourth Circuit, with Chief [fol. 49] Judge Parker as its organ, had occasion to decide a closely related question in two well considered cases, to wit: *State Farm Mutual Automobile Ins. Co. v. Huges*, 115 Fed. 2d 298, 132 A.L.R. 188, and *Maryland Casualty Co. v. Boyle Const. Co.*, 123 Fed. 2d 558. In the first of these, *Huges's* case, the plaintiff insurance company brought an action for a declaratory judgment, in circumstances stated by the court as follows:

"Plaintiff is an insurance company of the State of Illinois. It had issued a policy of automobile liability insurance to Patton's, Inc., one of the defendants, a South Carolina corporation, operating a laundry in that state. The policy covered a laundry truck of Patton's while being operated for commercial purposes, and one of its clauses provided that plaintiff would defend any suit for damages against Patton's arising out of the operation of the truck, even though such suit should be 'groundless, false or fraudulent'. Other defendants are citizens of South Carolina who were injured in a collision between the truck and a bus, the driver of the bus, the bus companies which owned and operated the bus, and the administrator of the truck driver, who was killed in the collision.

"The complaint as amended alleged that the truck was not being operated for commercial purposes at the time of the collision but was being operated by the driver, one McRae, 'for purposes purely personal to himself'; that claims for damages arising out of the

collision were not within the coverage of the policy for [fol. 50] that reason; that Patton's had demanded that plaintiff defend any claims made against it in connection with the collision; that claims had been filed against Patton's by persons injured; that suits were about to be brought on the claims against Patton's and that in the event of recovery in these suits claims would be made against plaintiff under the policy. It is alleged also that plaintiff would be required to employ counsel to defend the suits against Patton's and averred that the court was empowered under the Declaratory Judgment Act 'to determine herein, for the benefit of all parties plaintiff and defendant, whether in fact and in law, at the time of the aforementioned incident (accident), the defendant, Patton's, Inc., is liable to the other defendants herein or any of them, and, accordingly whether, under the same facts and circumstances, any liability attaches under the terms of plaintiff's policy to the defendant, Patton's Inc., and to the other defendants and in that regard the plaintiff alleges that under a proper construction of the terms of its aforesaid policy, under the facts above set forth, no liability under said policy exists, and that this plaintiff should not be put to the expense of litigating said question in the numerous individual suits that will be brought against Patton's, Inc., and against the representatives of the McRae estate involving that identical issue, but that said issues should be adjudicated herein and the question [fol. 51] of the plaintiff's liability under the terms of its aforesaid policy should be declared in this cause.' "

There the plaintiff also raised the question of coverage of its policy, but made its insured a party, and the latter joined in the claim that there was no coverage. It became necessary to align the insured on the same side as the plaintiff, and other defendants, being citizens of the same state, there was no diversity as between all plaintiffs and defendants, and it was dismissed for want of jurisdiction. Whereas, in the *Maryland Casualty Co. v. Pacific Coal & Oil Co.*, there was an issue between the insurer and insured as to whether the latter was protected by the policy. After

citing and reviewing numerous authorities, Judge Parker said:

"A case such as this is to be distinguished from one where there is a bona fide controversy between the non-resident insurance company and the insured, and where one holding a claim against the insured is brought in for the purpose of securing a complete settlement of the entire controversy. In such case the non-resident company is entitled to invoke the jurisdiction of the federal courts for the purpose of settling the controversy with the resident insured; and the fact that another resident may be joined for the purpose of obtaining a complete settlement of the controversy does not oust the jurisdiction. Such a case was before this court in *Aetna Casualty & Surety Co. v. Yeatts*, 4 Cir., 99 F. 2d 665, where there was a controversy between the company and the insured which would not [fol. 52] necessarily be decided in a suit between the claimant and the insured and where the interests of the company and the insured would be diverse in defending a suit instituted by the claimant. Such a case also was *Farm Bureau Mutual Automobile Ins. Co. v. Daniel*, 4 Cir., 92 F. 2d 838, where there was a bona fide controversy between the company and the insured and another company as to the coverage of the policy. *Very different is the case where, as here, the interest of the insurer in the litigation is identical with that of the insured and where there is no bona fide controversy of any sort between them. The liability of the insurer to the insured manifestly does not constitute a controversy where the insurer admits it; and the insurer may not use that liability as a means of trying in the federal court litigated claims which it has obligated itself to defend and which are properly cognizable in state tribunals.* Cf. *Steele v. Culver*, supra. To quote again the language of Mr. Justice Holmes in that case, "It seems * * * strange to suggest that a contract of a stranger with a stranger can affect the interest of the party immediately concerned." (Emphasis by the writer).

In the second case, *Maryland v. Boyle*, *supra*, the situation was identical with *Hugée*, and the following is quoted:

"As we pointed out in the *Hugée* case, if there were a bona fide controversy between plaintiff and the insured, a different situation would be presented; for in such case the basis for a realignment of parties would be absent. If, for example, there were a bona fide controversy over the meaning or coverage of the policy or over the question of its validity or expiration, it would no doubt be proper to invoke the power of the court to render a declaratory judgment against the insured and to join the claimant against the insured as a party defendant, so that there might be a complete settlement of the controversy. Of course the plaintiff has a justiciable controversy with the claimant, and there is diversity of citizenship between plaintiff and the claimant; *but insured is an indispensable party to any suit to settle that controversy (Steele v. Culver, 211 U.S. 26, 29 S. Ct. 9, 53 L. Ed. 74) and the joinder of insured defeats the jurisdiction, since its interest in the controversy is identical with that of plaintiff and it is a citizen of the same state as the claimant.*" (Emphasis by the writer).

In *Steele v. Culver*, 211 U.S. 26, the plaintiff corporation sued to annul a judgment against itself and its principal on a bond in the State Court wherein complainant had become the surety on appeal. The ground for annulling the judgment was that it had been obtained by fraud. The principal, or defendant in the judgment in the State Court, was made a party, but there was no prayer for relief against it. In disposing of the matter, the court had this to say:

"It is suggested that the controversy as to the [fol. 54] judgment against the Security Company is separable, and that relief may be given against that at least without the presence of the railroad. But the only ground on which that judgment is complained of is that *that* against the railroad, upon which it is based, was obtained by perjury and fraud. So long as the judgment against the railroad stands, that against its

surety cannot be impeached. By its bond the surety undertook to pay the judgment, if rendered, against its principal, whether right or wrong. If the principal remains liable under that judgment the surety is bound to pay. *Krall v. Libbey*, 53 Wisconsin, 292; *Piercy v. Piercy*, 1 Iredell Eq. 214, 218. *But the principal cannot be relieved by a proceeding behind its back.*" (Emphasis by the writer).

In a case like the present, brought on the authority of the State statute (Sec. 655, R.S. Tit. 22), if the insurer is either condemned or relieved of liability, it would be in a "proceeding behind the back" of the insured, involving a controversy wherein his negligence or that of his agents was the sole controversy; yet any such judgment could not be enforced against him, except in a new suit, if the insurer by chance became insolvent and unable to pay. It would seem, therefore, that the insured, for this reason also, is an indispensable party to any suit to establish his liability, which first must be done before the insurer can be forced to pay. Otherwise the real controversy or issue of negligence on the part of the insured remains undetermined as to him.

[fol. 55] Other considerations under the Louisiana law appear to demonstrate that the real controversy is between the complainant and the tortfeasor. It often happens that the injured person is covered by compensation insurance. If he is injured or killed in the course of his employment, such as driving his employer's vehicle, the compensation insurer pays the compensation. In such instances, the law of the State permits the compensation insurer (who is not included in Sec. 655 as having a direct action against the insurer of the tortfeasor) to intervene in a suit by the employee against the alleged tortfeasor for reimbursement out of any recovery, for payments so made. The basic right of action by the injured person is, as stated, legal subrogation to the right of the insured to require the insurer to pay, to the extent of its policy, after it has been found that the insured's fault caused the damage. This right of the compensation insurer to maintain its action also arises from legal subrogation to the rights of the employee against the third person, not his in-

surer, who is guilty of negligence. Thus, we find the compensation insurer, in a suit against the insurer alone, asserting a subrogation to the subrogation of the compensation employee to the contractual rights of the insured third person against his own insurer under his policy. Since those contractual rights do not become enforceable until his liability has been judicially established, it seems clear that the real controversy which this court is called upon to decide is that between the complainant and the third person whose fault he alleges caused his damage. *No one can recover in such an action until the issue of fault or negligence*, as between the injured person or his employer, where the latter's vehicle is also involved, and the third [fol. 56] person, has been determined; yet this optional direct action statute attempts to substitute the foreign insurer alone, in the place of the third person alleged tortfeasor. To defend such a suit, the insurer not being present when the accident occurs and having no information of its own, must depend upon its insured or his agents as to the facts. Feeling secure under the protection of his insurance, the insured is not actuated by the compulsion of vigilance of one faced with the risk of a large judgment against himself. See *Merchants Mutual Automobile Liability Ins. Co. v. Smart*, 267 U.S. 129. In other words, the insurer is forced to take over and defend, alone, the conduct of its insured in a controversy to which it is not the real party, and in a proceeding which entirely ignores the wrong-doer.

Further circumstances appear to demonstrate that the real controversy is between the complainant and the tortfeasor. If it transpires that the employer of the complainant, in the situation just described, has suffered property loss as a result of the same accident in which the employee was injured or killed, and for which the insurer of the third person has been sued, is not joined in the suit, there is nothing to prevent him from bringing his own independent action against such third person, or his insurer, which would again involve the identical controversy as to fault. On the other hand, if the injured person were required to sue the actual wrong-doer instead of his insurer, the controversy as to whose negligence caused the accident could

be determined finally in a single action as to all of those concerned.

Again, the courts of Louisiana have held that if the injured person sees fit to sue a single alleged tort feisor or [fol. 57] his insurer, as they often do, where two or more persons or their insurers are involved, the one so sued, or his insurer, cannot bring in the others or have recourse against their insurers until he has been condemned and has paid the whole judgment, thus necessitating another suit for contribution. Yet, if the Federal Court has unquestioned jurisdiction of the actual controversy, the Rules of Federal Procedure expressly provide for the bringing in of such other wrong-doers as third parties defendant for the settlement of the rights of all concerned at one time.

It is also well to call attention to the well known fact that in most of these suits in the Federal Courts of this State, the complainants allege damages greatly in excess of the maximum limits of the policies sued upon. The reason is obvious. The complainant wishes to impress the jury that he is sufficiently protected and should recover at least the full amount of the policy. Yet these suits are often filed against the insurer alone where the insured is financially able to respond in an amount exceeding the insurance, but, nevertheless, the action is brought against the insurer alone and the complainant thereby waives the right to pursue the alleged wrong-doer thereafter.

Sec. 655 of Title 22, R.S., not only gives the injured person the option to sue the insurer of the alleged wrong-doer, it also permits him to sue the insured alone, or with his insurer in a single action as he sees fit. In any event, no matter who he names among these three choices as the party or parties defendant, it is the same cause of action which is created by the Article 2315 of the Code. As before stated, the only parties to that controversy, under this codal provision, in any case, are the injured party and [fol. 58] the alleged wrong-doer, and since jurisdiction in the Federal Court, based upon diversity of citizenship, means the citizenship of the real parties to the controversy, the presence of the alleged tort feisor as the defendant is indispensable in any such action brought in this court to determine responsibility for the accident.

Finally, as sustaining the idea that it was never intended that citizens of the state in which the suit is brought should have the right to invoke the jurisdiction of the Federal Courts, on the ground of diverse citizenship, is the rule settled by statute and decisions that when sued by a non-resident, these citizens of the State cannot remove their cases to this court. *Glover Machine Works v. Cook Jellico Coal Co.*, 222 F. 53; *Sheets, et. al. vs. Shamrock Oil & Gas Co.*, 115 Fed. 2d 880, (5th Cir.) 313 U.S. 100. The plaintiff has but one cause of action no matter how many persons were involved or responsible for the accident. *Bentley v. Halliburton Oil Well Cementing Co.*, 174 F. 2d 788.

The re-hearing is denied.

Done and signed in Chambers, at Shreveport, Louisiana, this 30 day of October, 1952.

Sgd. Ben C. Dawkins, Judge.

[File endorsement omitted.]

[fol. 59] IN UNITED STATES DISTRICT COURT

JUDGMENT—Filed October 31, 1952

Defendant's Motion to Dismiss having been argued and briefs submitted, the Court having heretofore rendered a written opinion directing the presentation of proper decree sustaining said Motion to Dismiss, plaintiffs having moved for a rehearing thereon and having submitted briefs in support thereof, the Court being of the opinion that said Motion to Dismiss should be sustained.

It is ordered, adjudged and decreed that the defendant's Motion to Dismiss for lack of jurisdiction is hereby sustained and the Motion for Rehearing thereon is denied, and accordingly the demands of the complainant as set forth in her complaint are dismissed all at the cost of the complainant.

Shreveport, Louisiana, 31 October, 1952.

Sgd. Ben C. Dawkins, United States District Judge.

Approved as to form, Wilkinson, Lewis & Wilkinson,
Sgd. by John M. Madison, attorneys for complainant.

[File endorsement omitted.]

[fol. 60] IN UNITED STATES DISTRICT COURT

NOTICE OF APPEAL—Filed October 31, 1952

To the United States Court of Appeals, Fifth Circuit, New Orleans, Louisiana:

Notice is hereby given that Mrs. Florence R. Elbert, complainant-appellant, does hereby appeal to the United States Court of Appeals, for the Fifth Circuit, New Orleans, Louisiana, from the judgment rendered, filed and signed in this case by the Hon. Ben C. Dawkins, presiding trial Judge, on 31 October, 1952, sustaining and granting defendant's Motion to Dismiss for want of jurisdiction and overruling and denying complainant's Motion for a rehearing thereon.

Shreveport, Louisiana, 31 October, 1952.

Sgd. John M. Madison, Slattery Building, Shreveport, Louisiana; Sgd. Whitfield Jack, Johnson Building, Shreveport, Louisiana.

[Certificate of Service omitted in printing.]

[fol. 61] [File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

REQUEST THAT RECORD ON APPEAL BE PRINTED PRIOR TO TRANSMISSION TO UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT—Filed October 31, 1952.

To the Clerk of this Honorable Court:

Request that the entire record on appeal be printed prior to transmission to the United States Court of Appeals, Fifth Circuit, by R. T. Russ, Court Reporter, in compliance with Rule 23 (10) of the said Circuit Court of Appeals.

Shreveport, Louisiana, 31 October, 1952.

Sgd. John M. Madison, Slattery Building, Shreveport, Louisiana; Sgd. Whitfield Jack, Johnson Building, Shreveport, Louisiana, attorneys for complainant-appellant.

[File endorsement omitted.]

[fol. 62] IN UNITED STATES DISTRICT COURT

STATEMENT OF POINTS ON WHICH THE COMPLAINANT-APPELLANT INTENDS TO RELY UPON APPEAL—Filed October 31, 1952

Now comes complainant-appellant and shows that the points upon which she intends to rely on the appeal of this case to the United States Court of Appeals, Fifth Circuit, are as follows:

1. The Court erred in sustaining and granting defendant's Motion to Dismiss for lack of jurisdiction.
2. The Court erred in overruling complainant's Motion for a Rehearing on defendant's Motion to Dismiss for Lack of Jurisdiction.

Shreveport, Louisiana, 31 October, 1952.

Sgd. John M. Madison, Slattery Building, Shreveport, Louisiana; Sgd. Whitfield Jack, Johnson Building, Shreveport, Louisiana, attorneys for complainant-appellant.

[File endorsement omitted.]

[fol. 63-65] IN UNITED STATES DISTRICT COURT

DESIGNATION OF CONTENTS OF APPEAL RECORD—Filed October 31, 1952

Complainant-appellant designates and requests that the Clerk of this Court include the following in the appeal record:

1. The entire, complete record, including every pleading, every stipulation, the minutes of Court, all opinions of the Court, the bond, notice of appeal and all filings of any nature whatsoever.

2. Additionally, but not exclusively all of those things listed in Rule 75 (g) of the Federal Rules of Civil Procedure.

Shreveport, Louisiana, October 31, 1952.

Sgd John M. Madison, Slattery Building, Shreveport, Louisiana. Sgd. Whitfield Jack, Johnson Building, Shreveport, Louisiana, attorneys for complainant-appellant.

[File endorsement omitted.]

Bond on appeal for \$250.00 filed November 1, 1952, omitted in printing.

[fol. 66] IN UNITED STATES DISTRICT COURT

MOTION AND ORDER TO SEND POLICY UP ON APPEAL AS ORIGINAL DOCUMENT—Filed November 5, 1952

Now comes complainant-appellant and moves the Court for an order directing the Clerk of this Court to send the policy of insurance filed in this case as an original document to the Court of Appeals, Fifth Circuit, along with the Transcript of Record on Appeal, showing that the arrangement of the policy and the several sizes of type make it difficult and expensive to reproduce by printing, and

further showing that the stipulation in the case renders the policy itself of little relative importance.

Wilkinson, Lewis & Wilkinson, Slattery Bldg.,
Shreveport, La.; Booth, Lockard & Jack, Sgd. by
Whitfield Jack, Johnson Bldg., Shreveport, La.,
attorneys for complainant.

ORDER

The Clerk is directed to send the policy of insurance in this case as an original document to the Court of Appeals, Fifth Circuit, along with the Transcript of Record on appeal.

Shreveport, Louisiana, November 5, 1952.

Sgd. Ben C. Dawkins, United States District Judge.

[File endorsement omitted.]

[fol. 67] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 68] That thereafter the following proceedings were had in said cause in the United States Court of Appeals for the Fifth Circuit, viz:—

ARGUMENT AND SUBMISSION.

Extract from the Minutes of January 7, 1953.

No. 14353

MRS. FLORENCE R. ELBERT,

versus

LUMBERMAN'S MUTUAL CASUALTY COMPANY.

On this day this cause was called, and after argument by John M. Madison, Esq., and Whitfield Jack, Esq., for appellant, and Chas. L. Mayer, Esq., for appellee, was submitted to the Court.

[fol. 69] OPINION OF THE COURT—

Filed January 29, 1953.

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH
CIRCUIT

No. 14353

MRS. FLORENCE R. ELBERT,

Appellant,

versus

LUMBERMAN'S MUTUAL CASUALTY COMPANY,

Appellee.

Appeal from the United States District Court for the
Western District of Louisiana.

(January 29, 1953.)

Before Hutcheson, Chief Judge, and Strum and Rives,
Circuit Judges.

PER CURIAM: Brought under the provisions of Louisiana Revised Statutes 22:655, the Louisiana Direct Action Statute, against the insurer in an automobile liability policy issued by it to one S. W. Bowen, and covering the members of his household, the suit was for damages sustained by plaintiff as the result of the alleged negligence of Mrs. Bowen, the driver of the car.

[fol. 70] The defendant moved to dismiss the action on the ground that the complaint fails to state a claim against defendant upon which relief can be granted, and that there is no diversity of citizenship between the plaintiff and Mrs. Bowen, the real party in interest as defendant.

The district judge, in a detailed opinion,¹ fully discussing the reasons presented for and against the motion, and canvassing the applicable authorities, concluded, contrary to the contention of plaintiff, that the question presented for decision was not foreclosed by our cases² but was still open to him. So concluding, he sustained the motion and dismissed the action.

Plaintiff is here insisting that upon principle and authority, and particularly upon that of our cases cited in the note, the judgment was wrong and must be reversed.

We agree. The judgment is, therefore, reversed and the cause remanded for further and not inconsistent proceedings.

¹ *Elbert v. Lumbermen's Mutual Cas. Co.*, 107 Fed. Supp. 299, Cf. to the contrary *Lewis v. Manufacturers Cas. Ins. Co.*, 107 Fed. Supp. 465.

² *New Amsterdam Cas. Co. v. Soileau*, 167 F. (2) 767; *Fisher v. Home Indem. Co.*, 198 F. (2) 218; and *Cushing v. Maryland Cas. Co.*, 198 F. (2) 536.

[fol. 71]

JUDGMENT.

Extract from the Minutes of January 29, 1953.

No. 14353

MRS. FLORENCE R. ELBERT,

versus

LUMBERMAN'S MUTUAL CASUALTY COMPANY.

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Louisiana, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that said cause be, and it is hereby, remanded to the said District Court for further proceedings not inconsistent with the opinion of this Court;

It is further ordered and adjudged that the appellee, Lumberman's Mutual Casualty Company, be condemned to pay the costs of this cause in this Court, for which execution may be issued out of the said District Court.



[fol. 71] IN UNITED STATES COURT OF APPEALS, FIFTH
CIRCUIT

PETITION FOR REHEARING—Filed February 18, 1953

To the Honorable Judges of the United States Circuit
Court of Appeals for the Fifth Circuit:

Now into court comes Lumbermens Mutual Casualty Company, appellee in the above entitled cause, and presents this petition for rehearing and, in support thereof, respectfully represents that the Court erred in its [fol. 72] opinion and decree rendered January 29, 1953, in the following matters, to-wit:

1

That this Court has erred in giving such effect to an act of the legislature of the State of Louisiana as results in citizens of Louisiana being afforded an unfair and prejudicial advantage over non-resident litigants by invoking the jurisdiction of this Court on the grounds of diversity of citizenship, which basis of jurisdiction in the federal courts was created for the sole purpose of protecting non-resident litigants from discrimination in favor of resident litigants.

2

That the Court erred in not recognizing that the only *cause* of action under the laws of Louisiana, as distinguished from a right of action, existing in favor of an injured party as the result of the negligence of another is that which is created under the provisions of Article 2315 of the Civil Code of the State of Louisiana, which provides:

“Every act whatever of man that causes damage to another, obliges *him* by whose fault it happened to repair it . . .” (emphasis ours).

and that under these provisions the only *cause* of action which actually exists in the instant matter is that which the plaintiff and appellant, Mrs. Florence R. Elbert, has [fol. 73] against Mrs. S. W. Bowen, both of whom are citizens of the State of Louisiana.

3

That the Court erred in concluding that the previous decisions of this Court (*New Amsterdam Casualty Company vs. Soileau*, 167 Fed. (2) 767; *Fisher vs. Home Indemnity Company*, 198 Fed. (2) 218 and *Cushing vs. Maryland Casualty Company*, 198 Fed. (2) 536) had considered and determined the questions raised by the appellee herein and the contention advanced by appellee.

4

That in neither the opinion rendered by the Court in the instant matter nor in any of the previous decisions of this Court does it appear that the Court has heretofore considered or disposed of the questions raised by appellee herein and by the district judge in his disposition of this matter.

5

That the Court erred in failing to decline jurisdiction herein even though it may be determined that the parties involved are citizens of different states, since the matters involved are of a purely local nature and to entertain jurisdiction is prejudicial to the public interest (*Sun Oil Company vs. Burford*, 319 U.S. 315).

Wherefore, petitioner prays that the opinion and decree herein be recalled and that a rehearing be granted [fol. 74] and that the judgment of the district court be affirmed. Petitioner further prays for all orders necessary for general and equitable relief.

Chas. L. Mayer, Attorney for Defendant-Appellee.

CERTIFICATE OF SERVICE—(Omitted in Printing)

[fol. 76] OPINION ON PETITION FOR REHEARING AND JUDGE
RIVES DISSENTING.

OPINION ON PETITION FOR REHEARING—Filed March 17, 1953.

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH
CIRCUIT

No. 14353

MRS. FLORENCE R. ELBERT,

Appellant,

versus

LUMBERMAN'S MUTUAL CASUALTY COMPANY,

Appellee.

Appeal from the United States District Court for the
Western District of Louisiana.

ON PETITION FOR REHEARING.

(March 17, 1953.)

Before Hutcheson, Chief Judge, and Strum and Rives,
Circuit Judges.

PER CURIAM: It is ORDERED that the petition for rehearing in the above entitled and numbered cause be, and it is hereby DENIED.

[fol. 77] RIVES, Circuit Judge: I dissent.

RIVES, Circuit Judge, Dissenting:

On the original hearing, I had strong misgivings which were submitted to my brothers, but I was unable to crystallize my thinking clearly enough to justify a dissent. Continued consideration of the question has convinced me that there is something fundamentally wrong with our legal theories when they permit the great bulk of the

casualty damage suit litigation in Louisiana to clog the dockets of the federal courts, while, I understand, some of the state judges actually do not have enough litigation to keep them busy.

Suits by the injured party directly against the insurer may operate justly under the Civil Law of Louisiana where jury verdicts are not important (see *Wright vs. Paramount-Richards Theatres*, 198 F. 2d 303, 306), but where there is a common law right of trial by jury, as in the federal courts, it has been repeatedly recognized that juries are more prone to find liability and to assess heavy damages against a liability insurance company than against the insured. The mere mention of insurance to a jury is reversible error in all but four states of the union, 4 A. L. R. 2d. 761. With both the insured and the insurer present, the federal courts could, in furtherance of justice and to avoid prejudice, order separate trials as to the cause of action against the insured and as to the existence and coverage of the policy. See Rules 20(b) and 42(b), Federal Rules of Civil Procedure. In the absence of the insured as a party defendant, the federal court has no adequate power to protect a defendant insurance company from that known and well recognized prejudice.³ This Court would be naive not to realize that that factor has much to do with the bringing of most of the automobile damage suits in the federal courts rather than in the state courts of Louisiana.

The transfer of most of the casualty damage suit litigation from the state to the federal courts thus defeats any beneficial public policy of the Louisiana direct action statute intended to operate under the civil law system of Louisiana. It is further in direct conflict with the purpose

³ "But a trial in court is never, as respondents in their brief argue this one was, 'purely a private controversy * * * of no importance to the public.' The state, whose interest it is the duty of court and counsel alike to uphold, is concerned that every litigation be fairly and impartially conducted and that verdicts of juries be rendered only on the issues made by the pleadings and the evidence." N. Y. Central R. R. Co. vs. Johnson, 279 U. S. 310, 318.

of diversity jurisdiction designed to avoid "possible discrimination by state courts in favor of resident over non-resident litigants", 54 Am. Jur., United States Courts, Sec. 57; and operates rather to give full play to discrimination against the casualty insurance companies.

It seems to me that federal jurisdiction should be denied or declined upon several grounds. First, it involves the unconstitutional assumption of jurisdiction over controversies between citizens of the same state of Louisiana. Second, if not actually equitable in nature, the rights and procedure are so closely akin thereto that the same principles should be applied by the federal courts as in equity suits, and it should be held (a) that the insured is an indispensable party defendant, and (b) that in the exercise of their sound discretion in matters prejudicial to the public interest and which threaten the rightful independence of state governments in carrying out their domestic policy, the federal courts should decline to exercise jurisdiction against the insurer alone.

[fol. 79] Let use first consider the nature in law of these direct actions against the insurer. Under the law of Louisiana, an action in tort arises solely from Article 2315 of the Louisiana Civil Code reading in part: "Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it; * * *".

This action was brought against the appellee insurance company alone under the provisions of Louisiana Revised Statute 22:655, reading in part:

"* * * The injured person or his or her heirs, at their option, shall have a right of direct action against the insurer within the terms and limits of the policy in the parish where the accident or injury occurred or in the parish where the insured has his domicile, and said action may be brought against the insurer alone or against both the insured and the insurer, jointly and in solido. * * *"

By its policy issued to the named insured, the appellee company obligated itself "to pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of bodily injury * * *." The right of direct action by the injured person against the insurer must be "within the terms and limits of the policy." A cause of action against the insured is the first requisite to a direct action against the liability insurer. *Reeves vs. Globe Indemnity Co. of New York*, 182 La. 905, 162 So. 724; *Mock vs. Maryland Casualty Company*, 6 So. 2d. 199; *Burke vs. Massachusetts Bonding & Insurance Company*, 209 La. 495, 24 So. 2d. 875. The other requisite is, of course, the existence and coverage of the policy, a matter not here in dispute.

[fol. 80] The latest pertinent decision of the Supreme Court of Louisiana, *West vs. Monroe Bakery*, 217 La. 189, 46 So. 2d. 122, 123, has said that the object of the statute is to confer:

"* * * substantive rights on third parties to contracts of public liability insurance, which become vested at the moment of the accident in which they are injured."

See also *Fisher vs. Home Indemnity Co.*, 198 F. 2d. 218.

An even later opinion of the Louisiana Court of Appeals for the second circuit has spoken of the direct action statute as being procedural in nature. *Churchman vs. Ingram*, 56 So. 2d. 297. The confusion and disagreement as to whether the Act was merely procedural or created a substantive right is fully set forth in an earlier opinion by Judge Dawkins, *Bayard vs. Traders & General Ins. Co.*, 99 F. S. 343, 346-353. The case of *New Amsterdam Casualty Company vs. Soileau*, 167 F. 2d. 767, indicates that the act is both procedural and substantive. Clearly that part of the Act which gives a right of action direct against the insurer is substantive. Just as clearly, it seems to me, that part which provides that the action

may be brought against either the insurer alone or against both the insured and the insurer jointly is procedural, for the Act itself recognizes that it is just as possible for the injured person to reach the proceeds of a liability policy in an action against both the insured and the insurer as in one against the insurer alone.

The basis for this Court's holding in *New Amsterdam Casualty Co. vs. Soileau*, *supra*, that the action might be maintained in the federal court by the injured person against the insurer alone was that the Act subrogates "the [fol. 81] injured person to all the rights of the insured within the terms and limits of the policy". See also *Cushing vs. Maryland Casualty Co.*, 198 F. 2d. 536.

"A subrogee * * * occupies the position of the party for whom he is substituted, and succeeds to the same but no greater rights. He cannot acquire any claim, security, or remedy which the creditor did not have." 50 A. n. Jur., Subrogation, Section 110, page 753, and cases cited. Under the terms of the policy, the insured has a right to call upon the company to defend an action against him, but until he has been adjudged responsible to pay the injured party, the insured has no right to call on the insurer to pay the damages. Instead, therefore, of the statute having the effect of a legal subrogation in favor of the injured person to the rights of the insured, the operation of the statute in giving the injured person the right of action against the insurer is more accurately described by the Supreme Court of Louisiana in *Ruiz vs. Clancy*, 182 La. 935, 162 So. 734, 736, as accomplished "by compelling the insurer to respond—within the limits of the policy—to the obligation of the insured". The Louisiana Supreme Court has said that the suit by the injured person against the insurer is still *ex delicto*, a suit for damages for personal injuries. *Reeves vs. Globe Indemnity Co.*, *supra*. Instead of the injured party being substituted as a party plaintiff in the place of the insured, it is more realistic to say that the insurer is substituted as a party defend-

ant in the place of the insured. The overall effect of the statute, of the accident, and of the suit is to compensate the injured person by damages paid out of an asset provided by the insured.

[fol. 82] By virtue of written provisions in its Code, Louisiana has a limited jurisdiction akin to equity in some cases "where there is no express law" or "where positive law is silent", Louisiana Civil Code Art. 21. It does not have the "common law" and "equity" systems established in other states. *Le Blanc vs. City of New Orleans*, 70 So. 212, 217; *Hyman vs. Hibernia Bank & Trust Co.*, 71 So. 598, 603; *Osborn vs. City of Shreveport*, 79 So. 542, 545; *Southern Bell Telephone & Telegraph Co. vs. Louisiana Public Service Commission*, 164 So. 786, 790.

The Louisiana direct action statute seems intended to produce the results permitted in common law states by statutes like, for example, the Alabama statute (Alabama Code 1940, Title 28, Sec. 12) where "the judgment creditor may proceed in equity against the defendant and the insurance company to reach and apply the insurance money to the satisfaction of the judgment". See also 19 Am. Jur., Equity, Sec. 188; 8 Appleman's Ins. Law & Practice, Secs. 4833 *et seq.*; Blashfield's Cyc. of Auto. Law & Practice, Sec. 4071.

That diversity jurisdiction under the Constitution (Sec. 2 of Art. III) does not exist is elaborately developed in the able opinion of the district judge. *Elbert vs. Lumberman's Mutual Casualty Co.*, 107 F. S. 299. I would add only a few thoughts. The situation is clearly distinguishable from cases where the surety may be sued alone for the default of the principal, and is also distinguishable from cases like those of compulsory workmen's compensation insurance for the benefit of injured employees, where the insurance company may be sued alone. In all such cases there is a direct contractual obligation from the surety or insurance company to the injured party plain-[fol. 83] aff. Here the insurance was not compulsory; the

insured contracted for it voluntarily for his own protection; under the Louisiana statutes, all of the insured's rights under the policy are preserved insofar as they are consistent with the direct action against the insurer. An action against the insurer involves the establishment really of two causes of action; first, that against the insured and second, the insurer's responsibility therefor. They are not inseparable as in the pendent jurisdiction cases, *Hurn vs. Oursler*, 289 U. S. 238. As was said in that case, "The distinction to be observed is between a case where two distinct grounds in support of a single cause of action are alleged, one only of which presents a federal question, and a case where two separate and distinct causes of action are alleged, one only of which is federal in character." 289 U. S. at 246. It is permissible in Louisiana for both causes of action to be established in a single suit against the insurer, but when the diversity jurisdiction of a federal court is invoked, that court must recognize the two separate and distinct causes of action, and must accept jurisdiction of that one only which is federal in character.

If the district judge and I are mistaken and diversity jurisdiction does exist, it seems to me that the insured is an indispensable party defendant. "Whether parties are indispensable must be determined by the federal court according to federal rather than state rules, for the question of their jurisdiction is one which the federal courts must determine for themselves." *Ford vs. Adkins*, 39 F. S. 472, 474. See also *De Korwin vs. First National Bank of Chicago*, 156 F. 2d, 858; 3 Moore's Federal Practice (2nd, Ed.) Sec. 19.07, pages 2152, 2153.

[fol. 84] The principles announced by Mr. Justice Curtis in *Shields vs. Barrow*, 17 How. 130, 136, as to when parties are indispensable are still sound despite the difficulty in application of those principles. See 3 Moore's Federal Practice, Sec. 19.07, page 2150. Among other tests, a person is an indispensable party if his presence is necessary

to enable the court to do complete and final justice between the parties before the court and, further, if the interest of the absent party is "of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience" *Shields vs. Barrow, supra*. This court has said that "the fact that the decree would not be technically binding on the absent parties is not the controlling factor". *Keegan vs. Humble Oil & Refining Co.*, 155 F. 2d. 971, 973. In *California vs. Southern Pacific Co.*, 157 U. S. 229, 255, the Supreme Court says:

"Irrespective, then, of the extent, technically speaking, of the effect and operation of a decree as to the seven parcels, based on that ground, as *res adjudicata*, it is impossible to ignore the inquiry whether the interests of persons not before the court would be so affected and the controversy so left open to future litigation as would be inconsistent with equity and good conscience."

While the injured person under the Act has a right of direct action against the insurer, the insured also has certain property rights in the insurance policy, viz.: the insured has the right to be protected from liability to the [fol. 85] extent of the coverage of the policy, whether to the injured person or to some other person who has been or may be injured during the term of the policy.

If the injured party sues the insured first and the insurer has notice of the litigation and an opportunity to control its proceedings, the insurer is bound by the determination of liability of the insured. 8 Appleman's Ins. Law & Practice, Sec. 4860, and cases cited. Whether the reverse holds true, that is, whether the insured would be bound by the determination of liability against his insurer, is a much more difficult question. See 29 Am.

Jur., Insurance, Sec. 1084; Annotations, 137 A. L. R. 1016, 121 A. L. R. 890; 50 C. J. S., Judgments, Sec. 789. If the insured is so bound, then obviously he is an indispensable party defendant for he may lose his counterclaim against the injured person or may be deprived of a part or all of his insurance protection without having his day in court.

Even, however, if the judgment would not be technically binding on the insured as to the issue of liability, that fact is not the controlling factor in determining whether the insured is an indispensable party. *Keegan vs. Humble Oil & Refining Co.*, 155 F. 2d. 971, and authorities there cited. The injured party, having failed in a suit against the insurer direct, might still sue the insured. The judgment in the first suit would not conclusively estop the injured party for the issues would be different and it might be that that judgment was based on the failure of proof as to the existence and coverage of the policy, matters not involved in the suit against the insured. The injured party having recovered against the insured, the insured could then call on the insurer to pay the damages [fol. 86] and the fact that the insurer had successfully defended against the injured party would be no answer to the insured. The result follows that if the injured party is permitted to sue the insurer alone in the federal court, the court cannot do final and complete justice and the controversy may be left in such a condition that its final termination may be wholly inconsistent with equity and good conscience.

Finally, if I am mistaken both as to lack of diversity jurisdiction and in my view that the insured is an indispensable party defendant, then it still seems to me that the federal court, as a matter of sound discretion, should decline to exercise jurisdiction against the insurer alone because to do so would be prejudicial to the public interest and would not show "proper regard for the rightful independence of state governments in carrying out their domestic policy". *Pennsylvania vs. Williams*, 294 U. S.

176, 185; *Burford vs. Sun Oil Co.*, 319 U. S. 315, 318; *Great Lakes Co. vs. Huffman*, 319 U. S. 293, 297; *Meredith vs. Winter Haven*, 320 U. S. 228, 235; *Alabama Public Service Commission, et al. vs. Southern Ry. Co.*, 341 U. S. 341, 349, 350.

I, therefore, respectfully dissent.

[fol. 87] ORDER DENYING REHEARING.

Extract from the Minutes of March 17, 1953.

No. 14353

MRS. FLORENCE R. ELBERT,

versus

LUMBERMAN'S MUTUAL CASUALTY COMPANY.

It is ordered by the Court that the petition for rehearing filed in this cause be, and the same is hereby denied.

“Rives, Circuit Judge, dissents.”

[fol. 88] Clerk's Certificate to foregoing transcript omitted in printing.

(8320)

[fol. 85] SUPREME COURT OF THE UNITED STATES

No. 120, October Term, 1953

LUMBERMEN'S MUTUAL CASUALTY COMPANY, Petitioner,

vs.

FLORENCE R. ELBERT

ORDER ALLOWING CERTIORARI.—Filed May 17, 1954

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted. The case is assigned for argument on Monday, October 11, immediately following No. 29.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Jackson took no part in the consideration or decision of this application.

(5325)

TO OUR POLICYHOLDERS:

Lumbermen and the National Retailers are your companies. By virtue of this policy, you have become a member and an owner of these mutual insurance corporations.

Directors you elect and officers they choose endeavor to administer the affairs of your companies in a manner that will merit your approval. Their efforts can be made more effective with your full cooperation. The greater the success of the companies, the greater will be your benefit from membership, which includes cash dividends paid annually to policyholders.

You can cooperate—

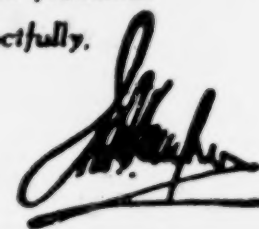
- by working with the companies in their comprehensive safety program to prevent accidents and reduce losses.
- by securing as new policyholders the best type of employers, motorists

and property owners, thereby benefiting them as well as strengthening your companies.

—by giving the management constructive criticism and suggestions for the improvement of its departments, branch offices, and service generally.

An Audit Bureau has been established to assist policyholders with respect to all types of insurance. Call upon it for information about your policies or advice concerning any of your insurance problems.

Respectfully,



Chairman

NON-ASSESSABLE AUTOMOBILE POLICIES (SEPARATE INSURANCE BY TWO COMPANIES) ISSUED BY

LUMBERMENS MUTUAL CASUALTY COMPANY

Home Office: Mutual Insurance Building, Chicago 40

AND

NATIONAL RETAILERS MUTUAL INSURANCE COMPANY

Executive Offices: 7450 Sheridan Road, Chicago 26

DECLARATIONS

1. Name of insured S. W. BOWEN
Address 147 BOULEVARD, SHREVEPORT, CADDOPARISH, LOUISIANA
The automobile will be principally garaged in the above city, county and state, unless otherwise stated herein.
Named insured employed by WOODARD-WALKER-BOWEN, INC. Position MANAGER
Kind of business LBR. BROKERAGE Address of employer SHREVEPORT, LOUISIANA

Trustee
Partnership
Corporation
Individual

2. Policy Period: From APRIL 16, 1950 to APRIL 16, 1951 12:01 A. M., Standard Time at the address of the named insured as stated herein.
3. The passenger automobiles will be used for "pleasure and business" and the commercial automobiles will be used for "commercial."
4. Description of the automobile is stated below. The insurance afforded is only with respect to such and so many of the following coverages as are indicated by specific premium charge or charges. The limit of the company's liability against each such coverage shall be as stated herein, subject to all the terms of the policy having reference thereto.

Year or Model	Trade Name	Body Type; Truck Size; Truck Load Cap.	F.O.B. List Price or delivered Price at Factory	Actual Cost When Purchased Including Equip.	Date Purchased Month Year	New or Used
1949	C. CHRYSLER	4 DR. SEDAN				
Model	Motor Number	Serial Number				
WINDSOR	C45-13763	70735868	\$ 11	\$2739.40	4-49	NEW
COVERAGES		LIMITS OF LIABILITY		National Premium		Lumbermens Premium
A—Bodily Injury Liability		\$50,000 Each Person \$100,000 Each Accident		X X X		\$ 30.36
B—Property Damage Liability		\$5,000 Each Accident		X X X		\$ 13.50
C—Collision or Upset		Actual Cash Value Less \$ 100.00 Deductible		\$ 43.00		\$
D—Medical Payments		\$500.00 Each Person		X X X		\$ 5.00
E—Comprehensive	EXCLUDING FIRE & THEFT. EXCLUDING COLLISION	ACV		\$ 24.00		X X X
F—Fire, Lightning & Transportation		ACV		\$ INCL.		X X X
G—Theft (Broad Form)		ACV		\$ INCL.		X X X
H—Windstorm		ACV		\$ INCL.		X X X
I—Combined Additional Coverage				\$ NIL		X X X
Supplemental Coverage				\$ NIL		
Total Premium \$ 115.86 divided as follows:				\$ 67.00		\$ 48.86

5. Except with respect to bailment lease, conditional sale, mortgage or other encumbrance the named insured is sole owner of the automobile, except as follows: NO EXCEPTIONS
Any loss hereunder is payable as interest may appear to the named insured and of the encumbrance, if any, is \$ represented by notes of \$ each. Due date of final installment is
6. During the past year no insurer has cancelled any automobile insurance issued to the named insured, except as follows: NO EXCEPTIONS
Countersigned at SHREVEPORT, LOUISIANA KEITH D. PETERSON
Countersignature date MARCH 20, 1950
Licensed Resident Agent

able Policy
MUTUAL
MPANY
Building, Chicago 40
AILERS
RANCE
Y
New York

Mutual
Lumbermen
a home office in
Chicago, Illinois,
and the annual
meeting of the
Mutual Insurance
Company is held at
the Glen Cove
Hotel, New York,
on the third
Tuesday of each
year at two o'clock
P.M. in person or by
proxy.

INSURED S. W. BOWEN
ADDRESS 147 BOULEVARD,
CITY SHREVEPORT STATE LOUISIANA
EFFECTIVE 4-16-50 EXPIRATION 4-16-51

Combination Automobile P
LUMBERMENS MUT
CASUALTY COMPA
Home Office: Mutual Insurance Building, Chicago 40
AND
NATIONAL RETAIL
MUTUAL INSURAN
COMPANY
Home Office: Glen Cove, New York

The annual meeting of the Lumbermen Casualty Company is held at its home office in Chicago, Illinois, on the third Tuesday of each year at eleven o'clock A.M., and the meeting of the National Retailers Mutual Insurance Company is held at its home office in Glen Cove, New York, on the third Tuesday of each year at two o'clock P.M. in person or by proxy.

ADDRESS 147 BOULEVARD,
CITY SHREVEPORT STATE LOUISIANA
EFFECTIVE 4-16-50 EXPIRATION 4-16-51
MAKE OF CAR CHRYSLER MOTOR NUMBER C45-13763
AGENT KEITH D. PETERSON INSURANCE AGENCY
ADDRESS SHREVEPORT, LOUISIANA

POLICY
NO.

XXXXXXXXXXXX
XXXXXXXXXXXX
U 945 639

RENEWAL OF U 437 776

N.R.M. DIV. \$12.62
ON EXP. POL.
L.M.-C.V. DIV. \$ 7.33
ON EXP. POL.

Short Rate Cancellation Table For One Year Policies

Days Policy in Force	Per Cent of One Year Premium	Days Policy in Force	Per Cent of One Year Premium
1	5%	154-156	53%
2	6	157-160	54
3	7	161-164	55
4	8	165-167	56
5	9	168-171	57
6	10	172-175	58
7	11	176-178	59
8	12	179-182	60
9	13	183-187	61
10	14	188-191	62
11	15	192-196	63
12	16	197-200	64
13	17	201-205	65
14	18	206-209	66
15	19	210-214	67
16	20	215-218	68
17	21	219-223	69
18	22	224-228	70
19	23	229-232	71
20	24	233-237	72
21	25	238-241	73
22	26	242-246	74
23	27	247-250	75
24	28	251-255	76
25	29	256-260	77
26	30	261-264	78
27	31	265-269	79
28	32	270-273	80
29	33	274-278	81
30	34	279-282	82
31	35	283-287	83
32	36	288-291	84
33	37	292-296	85
34	38	297-301	86
35	39	302-305	87
36	40	306-310	88
37	41	311-314	89
38	42	315-319	90
39	43	320-323	91
40	44	324-328	92
41	45	329-332	93
42	46	333-337	94
43	47	338-342	95
44	48	343-346	96
45	49	347-351	97
46	50	352-355	98
47	51	356-360	99
48	52	361-365	100

LUMBERMENS MUTUAL CASUALTY COMPANY
AND
NATIONAL RETAILERS MUTUAL INSURANCE COMPANY

LUMBERMENS MUTUAL CASUALTY COMPANY
AND
NATIONAL RETAILERS MUTUAL INSURANCE COMPANY
(EACH A MUTUAL INSURANCE COMPANY, HEREIN CALLED THE COMPANY)

Severally agree with the insured, named in the declarations made a part hereof, in consideration of the payment of the premium and in reliance upon the statements in the declarations and subject to the limits of liability, exclusions, conditions and other terms of this policy, provided (1) the Lumbermens Mutual Casualty Company shall be the insurer with respect to any one or more of the coverages for which a premium is specified in item 4 of the declarations and no other and (2) the National Retailers Mutual Insurance Company shall be the insurer with respect to any one or more of the coverages for which a premium is specified in item 4 of the declarations and no other:

INSURING AGREEMENTS

I. Coverage A—Bodily Injury Liability. To pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of bodily injury, sickness or disease, including death at any time resulting therefrom, sustained by any person, caused by accident and arising out of the ownership, maintenance or use of the automobile.

Coverage B—Property Damage Liability. To pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of injury to or destruction of property, including the loss of use thereof, caused by accident and arising out of the ownership, maintenance or use of the automobile.

Coverage C—Collision or Upset. To pay for direct and accidental loss of or damage to the automobile, hereinafter called loss, caused by collision of the automobile with another object or by upset of the automobile, but only for the amount of each such loss in excess of the deductible amount, if any, stated in the declarations as applicable hereto.

Coverage D—Medical Payments. To pay all reasonable expenses incurred within one year from the date of accident for necessary medical, surgical, ambulance, hospital, professional nursing and funeral services, to or for each person who sustains bodily injury, sickness or disease, caused by accident, while in or upon, entering or alighting from the automobile if the automobile is being used by the named insured or with his permission.

Coverage E—Comprehensive Loss of or Damage to the Automobile, Except by Collision or Upset. To pay for any direct and accidental loss of or damage to the automobile, hereinafter called loss, except loss caused by collision of the automobile with another object or by upset of the automobile or by collision of the automobile with a vehicle to which it is attached. Breakage of glass and loss caused by missiles, falling objects, fire, theft, explosion, earthquake, windstorm, hail, water, flood, vandalism, riot or civil commotion shall not be deemed loss caused by collision or upset.

Coverage F—Fire, Lightning and Transportation. To pay for direct and accidental loss of or damage to the automobile, hereinafter called loss, caused (a) by fire or lightning, (b) by smoke or smudge due to a sudden, unusual and faulty operation of any fixed heating equipment serving the premises in which the automobile is located,

falling objects, etc., theft, explosion, earthquake, windstorm, hail, water, flood, vandalism, riot or civil commotion shall not be deemed loss caused by collision or upset.

Coverage F—Fire, Lightning and Transportation. To pay for direct and accidental loss of or damage to the automobile, hereinafter called loss, caused (a) by fire or lightning, (b) by smoke or smudge due to a sudden, unusual and faulty operation of any fixed heating equipment serving the premises in which the automobile is located, or (c) by the stranding, sinking, burning, collision or derailment of any conveyance in or upon which the automobile is being transported on land or on water.

Coverage G—Theft (Broad Form). To pay for loss of or damage to the automobile, hereinafter called loss, caused by theft, larceny, robbery or pilferage.

Coverage H—Windstorm, Earthquake, Explosion, Hail or Water. To pay for direct and accidental loss of or damage to the automobile, hereinafter called loss, caused by windstorm, hail, earthquake, explosion, external discharge or leakage of water except loss resulting from rain, snow or sleet.

Coverage I—Combined Additional Coverage. To pay for direct and accidental loss of or damage to the automobile, hereinafter called loss, caused by windstorm, hail, earthquake, explosion, riot or civil commotion, or the forced landing or falling of any aircraft or of its parts or equipment, flood or rising waters, external discharge or leakage of water except loss resulting from rain, snow or sleet.

II. Defense, Settlement, Supplementary Payments. As respects the insurance afforded by the other terms of this policy under coverages A and B the company shall:

- (a) defend any suit against the insured alleging such injury, sickness, disease or destruction and seeking damages on account thereof, even if such suit is groundless, false or fraudulent; but the company may make such investigation, negotiation and settlement of any claim or suit as it deems expedient;
- (b) pay all premiums on bonds to release attachments for an amount not in excess of the applicable limit of liability of this policy, all premiums on appeal bonds required in any such defended suit, the cost of bail bonds required

of the insured in the event of accident or traffic law violation during the policy period, not to exceed the usual charges of surety companies nor \$100 per bail bond, but without any obligation to apply for or furnish any such bonds;

- (c) pay all expenses incurred by the company, all costs taxed against the insured in any such suit and all interest accruing after entry of judgment until the company has paid, tendered or deposited in court such part of such judgment as does not exceed the limit of the company's liability thereon;
- (d) pay expenses incurred by the insured for such immediate medical and surgical relief to others as shall be imperative at the time of the accident;
- (e) reimburse the insured for all reasonable expenses, other than loss of earnings, incurred at the company's request.

The amounts incurred under this insuring agreement, except settlements of claims and suits, are payable by the company in addition to the applicable limit of liability of this policy.

III. Definition of Insured. With respect to the insurance for bodily injury liability and for property damage liability the unqualified word "insured" includes the named insured and also includes any person while using the automobile and any person or organization legally responsible for the use thereof, provided the actual use of the automobile is by the named insured or with his permission. The insurance with respect to any person or organization other than the named insured does not apply:

- (a) to any person or organization, or to any agent or employee thereof, operating an automobile repair shop, public garage, sales agency, service station or public parking place, with respect to any accident arising out of the operation thereof;
- (b) to any employee with respect to injury to or sickness, disease or death of another employee of the same employer injured in the course of such employment in an accident arising out of the maintenance or use of the automobile in the business of such employer.

IV. Automobile Defined, Trailers, Two or More Automobiles, Including Automatic Insurance.

- (a) to any employee with respect to injury to or sickness, disease or death of another employee of the same employer injured in the course of such employment in an accident arising out of the maintenance or use of the automobile in the business of such employer.

IV. Automobile Defined, Trailers, Two or More Automobiles, Including Automatic Insurance.

- (a) **Automobile.** Except where stated to the contrary, the word "automobile" means:

- (1) **Described Automobile**—the motor vehicle or trailer described in this policy;
- (2) **Utility Trailer**—under coverages A, B and D, a trailer not so described, if designed for use with a private passenger automobile, if not being used with another type automobile and if not a home, office, store, display or passenger trailer;
- (3) **Temporary Substitute Automobile**—under coverages A, B and D, an automobile not owned by the named insured while temporarily used as the substitute for the described automobile while withdrawn from normal use because of its breakdown, repair, servicing, loss or destruction.
- (4) **Newly Acquired Automobile**—an automobile, ownership of which is acquired by the named insured who is the owner of the described automobile, if the named insured notifies the company within thirty days following the date of its delivery to him, and if either it replaces an automobile described in this policy or the company insures all automobiles owned by the named insured at such delivery date; but the insurance with respect to the newly acquired automobile does not apply to any loss against which the named insured has other valid and collectible insurance. The named insured shall pay any additional premium required because of the application of the insurance to such newly acquired automobile.

The word "automobile" also includes under coverages C, E, F, G, H and I its equipment and other equipment permanently attached thereto.

INSURING AGREEMENTS (Continued)

(b) **Semitrailer.** The word "trailer" includes semitrailer.

(c) **Two or More Automobiles.** When two or more automobiles are insured hereunder, the terms of this policy shall apply separately to each, but a motor vehicle and a trailer or trailers attached thereto shall be held to be one automobile as respects limits of liability under coverages A and B and separate automobiles as respects limits of liability, including any deductible provisions, under coverages C, E, F, G, H, and I.

V. Use of Other Automobiles. If the named insured is an individual who owns the automobile classified as "pleasure and business" or husband and wife either or both of whom own said automobile, such insurance as is afforded by this policy for bodily injury liability, for property damage liability and for medical payments with respect to said automobile applies with respect to any other automobile, subject to the following provision:

(a) With respect to the insurance for bodily injury liability and for property damage liability the unqualified word "insured" includes (1) such named insured, (2) the spouse of such individual if a resident of the same household and (3) any other person or organization legally responsible for the use by such named insured or spouse of an automobile not owned or hired by such other person or organization. Insuring Agreement III, Definition of Insured, does not apply to this insurance.

(b) This insuring agreement does not apply:

- (1) to any automobile owned by, hired as part of a frequent use of hired automobiles by, or furnished for regular use to the named insured or a member of his household other than a private chauffeur or domestic servant of the named insured or spouse;
- (2) to any automobile while used in the business or occupation of the named insured or spouse except a private passenger automobile operated or occupied by such named insured, spouse, chauffeur or servant;

This policy does not apply:

- (a) while the automobile is used as a public or livery conveyance, unless such use is specifically declared and described in this policy and premium charged therefor;
- (b) under coverages A, B and D, to liability assumed by the insured under any contract or agreement;
- (c) under coverages A and B, while the automobile is used for the towing of a trailer owned or hired by the insured and not covered by like insurance in the company; or while any trailer covered by this policy is used with any automobile owned or hired by the insured and not covered by like insurance in the company;
- (d) under coverages A and D, to bodily injury to or sickness, disease or death of any employee of the insured while engaged in the employment, other than domestic, of the insured or in domestic employment if benefits therefor are either payable or required to be provided under any workmen's compensation law;
- (e) under coverage A, to any obligation for which the insured or any company as his insurer may be held liable under any workmen's compensation law;
- (f) under coverage B, to injury to or destruction of property owned by, rented to, in charge of or transported by the insured;

(3) to any accident arising out of the operation of an automobile repair shop, public garage, sales agency, service station or public parking place;

(4) under coverage D, unless the injury results from the operation of such other automobile by such named insured or spouse or on behalf of either by such chauffeur or servant, or from the occupancy of said automobile by such named insured or spouse.

VI. Loss of Use by Theft—Rental Reimbursement. The company, following a theft covered under this policy, shall reimburse the named insured for expenses not exceeding \$5 for any one day nor totaling more than \$150 or the actual cash value of the automobile at time of theft, whichever is less, incurred for the rental of a substitute automobile, including taxicabs.

Reimbursement is limited to such expense incurred during the period commencing seventy-two hours after such theft has been reported to the company and the police and terminating, regardless of expiration of the policy period, on the date the whereabouts of the automobile becomes known to the named insured or the company or on such earlier date as the company makes or tenders settlement for such theft.

Such reimbursement shall be made only if the stolen automobile was a private passenger automobile not used as a public or livery conveyance and not owned and held for sale by an automobile dealer.

VII. General Average and Salvage Charges. The company, with respect to such transportation insurance as is afforded by this policy, shall pay any general average and salvage charges for which the named insured becomes legally liable.

VIII. Policy Period, Territory, Purpose of Use. This policy applies only to accidents which occur and to direct and accidental losses to the automobile which are sustained during the policy period, while the automobile is within the United States of America, its territories or possessions, Canada or Newfoundland, or is being transported between ports thereof, and is owned, maintained and used for the purposes stated as applicable thereto in the declarations.

EXCLUSIONS

(g) under coverage D, to bodily injury to or sickness, disease or death of any person if benefits therefor are payable under any workmen's compensation law;

(h) under coverages C, E, F, G, H and I, (1) while the automobile is subject to any bailment lease, conditional sale, mortgage or other encumbrance not specifically declared and described in this policy; (2) to loss due to war, whether or not declared, invasion, civil war, insurrection, rebellion or revolution or to confiscation by duly constituted governmental or civil authority; (3) to any damage to the automobile which is due and confined to wear and tear, freezing, mechanical or electrical breakdown or failure, unless such damage is the result of other loss covered by this policy; (4) to robes, wearing apparel or personal effects; or (5) to tires unless damaged by fire or stolen or unless such loss be coincident with other loss covered by this policy;

(i) under coverages E and G, to loss due to conversion, embezzlement or secretion by any person in lawful possession of the automobile under a bailment lease, conditional sale, mortgage or other encumbrance;

(j) under coverage C, to breakage of glass if insurance with respect to such breakage is otherwise afforded.

CONDITIONS

1. Use. (a) The term "pleasure and business" is defined as personal, pleasure, family and business use. (b) The term "commercial" is defined as use principally in the business occupation of the named insured as stated in Declaration 1, including occasional use for personal, pleasure, family and other business purposes. (c) Use of the automobile for the purposes stated includes the loading and unloading thereof.

2. Notice of Accident. When an accident occurs written notice shall be given by or on behalf of the insured to the company or any of its authorized agents as soon as practicable. Such notice shall contain particulars sufficient to identify the insured and also reasonably obtainable information respecting the time, place and circumstances of the accident, the names and addresses of the injured and of available witnesses.

3. Notice of Claim or Suit. If claim is made or suit is brought against the insured, the insured shall immediately forward to the company every demand, notice, summons or other process received by him or his representative.

4. Limits of Liability. The limit of bodily injury liability stated in the declarations as applicable to "each person" is the limit of the company's liability for all damages, including damages for care and loss of services, arising out of bodily injury, sickness or disease, including death at any time resulting therefrom, sustained by one person in any one accident; the limit of such liability stated in the declarations as applicable to "each accident" is, subject to the above provision respecting each person, the total limit of the company's liability for all damages, including damages for care and loss of services, arising out of bodily injury, sickness or disease, including death at any time resulting therefrom, sustained by two or more persons in any one accident.

the limit of such liability stated in the declarations as applicable to "each accident" is, subject to the above provision respecting each person, the total limit of the company's liability for all damages, including damages for care and loss of services, arising out of bodily injury, sickness or disease, including death at any time resulting therefrom, sustained by two or more persons in any one accident.

5. Limit of Liability. The limit of liability for medical payments stated in the declarations as applicable to "each person" is the limit of the company's liability for all expenses incurred by or on behalf of each person who sustains bodily injury, sickness or disease, including death resulting therefrom, in any one accident.

6. Limits of Liability. The inclusion herein of more than one insured shall not operate to increase the limits of the company's liability.

7. Action Against Company. No action shall lie against the company unless, as a condition precedent thereto, the insured shall have fully complied with all terms of this policy, nor until the amount of the insured's obligation to pay shall have been finally determined either by judgment against the insured after actual trial or by written agreement of the insured, the claimant and the company.

Any person or organization or the legal representative thereof who has secured such judgment or written agreement shall thereafter be entitled to recover under this policy to the extent of the insurance afforded by this policy. Nothing contained in this policy shall give any person or organization any right to join the company as a co-defendant in any action against the insured to determine the insured's liability.

Bankruptcy or insolvency of the insured or of the insured's estate shall not relieve the company of any of its obligations hereunder.

8. Action Against Company. No action shall lie against the company unless, as a condition precedent thereto, there shall have been full compliance with all the terms of this policy, nor until thirty days after the required proofs of claim have been filed with the company.

9. Financial Responsibility Laws. Such insurance as is afforded by this policy for bodily injury liability or property damage liability shall comply with the provisions of the motor vehicle financial responsibility law of any state or province which shall be applicable with respect to any such liability arising out of the ownership, maintenance or use of the automobile during the policy period, to the extent of the coverage and limits of liability required by such law, but in no event in excess of the limits of liability stated in this policy. The insured agrees to reimburse the company for any payment made by the company which it would not have been obligated to make under the terms of this policy except for the agreement contained in this paragraph.

out of the ownership, maintenance or use of the automobile during the policy period, to the extent of the coverage and limits of liability required by such law, but in no event in excess of the limits of liability stated in this policy. The insured agrees to reimburse the company for any payment made by the company which it would not have been obligated to make under the terms of this policy except for the agreement contained in this paragraph.

10. Assault and Battery. Assault and battery shall be deemed an accident unless committed by or at the direction of the insured.

11. Medical Reports; Proof and Payment of Claim. As soon as practicable the injured person or someone on his behalf shall give to the company written proof of claim, under oath if required, and shall, after each request from the company, execute authorization to enable the company to obtain medical reports and copies of records. The injured person shall submit to physical examination by physicians selected by the company when and as often as the company may reasonably require.

The company may pay the injured person or any person or organization rendering the services and such payment shall reduce the amount payable hereunder for such injury. Payment hereunder shall not constitute admission of liability of the insured or, except hereunder, of the company.

12. Named Insured's Duties. When loss occurs, the named insured shall:

(a) protect the automobile, whether or not the loss is covered by this policy, and any further loss due to the named insured's failure to protect shall not be recoverable under this policy; reasonable expense incurred in affording such protection shall be deemed incurred at the company's request;

(b) give notice thereof as soon as practicable to the company or any of its authorized agents and also, in the event of theft, larceny, robbery or pilferage, to the police but shall not, except at his own cost, offer to pay any reward for recovery of the automobile;

(c) file proof of loss with the company within sixty days after the occurrence of loss, unless such time is extended in writing by the company, in the form of a sworn statement of the named insured setting forth the interest of the named insured and of all others in the property affected, any encumbrances thereon, the actual cash value thereof at time of loss, the amount, place, time and cause of such loss, the amount of rental or other expense for which reimbursement is provided under this policy, together with original receipts therefor, and the description and amounts of all other insurance covering such property.

Upon the company's request, the named insured shall exhibit the damaged property to the company and submit to examinations under oath by anyone designated by the company, subscribe the same and produce for the company's examination all pertinent records and sales invoices, or certified copies if originals be lost, permitting copies thereof to be made, all at such reasonable times and places as the company shall designate.

13. Appraisals. If the named insured and the company fail to agree as to the amount of loss, each shall on the written demand of either, make within sixty days after receipt of proof of loss by the company, select a competent and disinterested appraiser, and the appraisal shall be made at a reasonable time and place. The appraisers shall first select a competent and disinterested umpire, and failing for fifteen days to agree upon such umpire, then, on the request of the named insured or the company,

notice of loss the company or its representative shall provide the insured with a blank or blanks in duplicate, to be used for the purpose of making such proofs of loss.

25. Special Missouri Conditions—Proof of Loss. As respects the State of Missouri, the sixty day provision for filing proof of loss with the company is extended to ninety days.

26. Terms of Policy Conformed to Statute. Terms of this policy which are in conflict with the statutes of the State wherein this policy is issued are hereby amended to conform to such statutes.

27. Declarations. By acceptance of this policy the named insured agrees that the statements in the declarations are his agreements and representations, that this policy is issued in reliance upon the truth of such representations and that this policy embodies all agreements existing between himself and the company or any of its agents relating to this insurance.

28. Mutual Policy Conditions. This is a perpetual mutual corporation owned by and operated for the benefit of its members. This is a non-assessable, participating policy under which the Board of Directors in its discretion may determine and pay unabsorbed premium deposit refunds (dividends) to the insured.

IN WITNESS WHEREOF, the LUMBERMENS MUTUAL CASUALTY COMPANY has caused this policy to be signed by its President and Secretary at Chicago, Illinois, but this policy shall not be valid unless countersigned on the declarations page by a duly authorized representative of the company.

H. L. Kennerly Secretary

M. L. Simpson President

IN WITNESS WHEREOF, the NATIONAL RETAILERS MUTUAL INSURANCE COMPANY has caused this policy to be signed by its President and Secretary at Glen Cove, New York, but this policy shall not be valid unless countersigned on the declarations page by a duly authorized representative of the company.

Charles M. Smith Secretary

W. L. Simpson President

4833 et seq.; 6 Blashfield's Cyc. of Auto. Law & Practice, Sec. 4071.

That diversity jurisdiction under the Constitution, Sec. 2 of Art. III, does not exist is elaborately developed in the able opinion of the district judge. *Elbert v. Lumberman's Mutual Casualty Co.*, D.C. 107 F. Supp. 299. I would add only a few thoughts. The situation is clearly distinguishable from cases where the surety may be sued alone for the default of the principal, and is also distinguishable from cases like those of compulsory workmen's compensation insurance for the benefit of injured employees, where the insurance company may be sued alone. In all such cases there is a direct contractual obligation from the surety or insurance company to the injured party plaintiff. Here the insurance was not compulsory; the insured contracted for it voluntarily for his own protection; under the Louisiana statutes, all of the insured's rights under the policy are preserved insofar as they are consistent with the direct action against the insurer. An action against the insurer involves the establishment really of two causes of action; first, that against the insured and second, the insurer's responsibility therefor. They are not inseparable as in the pendent jurisdiction cases, *Hurn v. Oursler*, 289 U.S. 238, 53 S. Ct. 586, 77 L. Ed. 1148. As was said in that case, "The distinction to be observed is between a case where two distinct grounds in support of a single cause of action are alleged, one only of which presents a federal question, and a case where two separate and distinct causes of action are alleged, one

in a cause entitled

Mrs. Florence R. Elbert

versus

Lumbermens Mutual Casualty Company

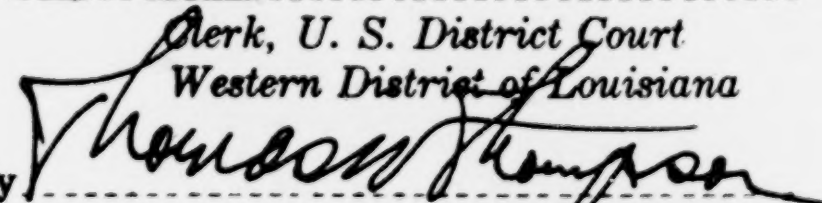
No. 3548 on the Civil docket of said Court, as the original of
same appears on file in this office.

WITNESS my hand and seal of office at the City of Shreveport, Louisiana, on
this the 10th day of August, A.D. 1954

ALTON L. CURTIS

Clerk, U. S. District Court
Western District of Louisiana

By


Deputy Clerk

He concluded that federal jurisdiction should be denied or declined because, "First, it involves the unconstitutional assumption of jurisdiction over controversies between citizens of the same state of Louisiana. Second, if not actually equitable in nature, the rights and procedure are so closely akin thereto that the same principles should be applied by the federal courts as in equity suits, and it should be held (a) that the insured is an indispensable party defendant, and (b) that in the exercise of their sound discretion in matters prejudicial to the public interest and which threaten the rightful independence of state governments in carrying out their domestic policy, the federal courts should decline to exercise jurisdiction against the insurer alone."

REASONS FOR GRANTING THE WRIT

This is an action brought by a citizen of Louisiana against a non-resident insurance company seeking to recover damages suffered as a result of alleged acts of negligence committed in the State of Louisiana by a citizen of Louisiana to whom the non-resident insurance company had issued a contract of public liability insurance. As pointed out by the opinion of the district court this is merely one of a large number of similar suits filed in the federal district courts of Louisiana which has doubled the work of that court, all of said suits being by citizens of Louisiana alleging that the controversy is between citizens of different states. Judge Rives in his dissenting opinion recognized "that there is something fundamentally wrong

parish where the accident or injury occurred or in the parish where the insured has his domicile, and said action may be brought against the insurer alone or against both the insured and the insurer, jointly and in solido. This right of direct action shall exist whether the policy of insurance sued upon was written or delivered in the State of Louisiana or not and whether or not such policy contains a provision forbidding such direct action, provided the accident or injury occurred within the State of Louisiana. Nothing contained in this Section shall be construed to affect the provisions of the policy or contract if the same are not in violation of the laws of this state. It is the intent of this Section that any action brought hereunder shall be subject to all of the lawful conditions of the policy or contract and the defenses which could be urged by the insurer to a direct action brought by the insured, provided the terms and conditions of such policy or contract are not in violation of the laws of this state. As amended, Acts 1950, No. 541, paragraph 1."

District Court of the United States

Western District of Louisiana

CLERK'S OFFICE

I, -----ALTON L. CURTIS-----, Clerk of the United States District Court for
the Western District of Louisiana, do hereby certify that the foregoing -----TWO (2)-----
pages contain a full, true, and correct copy of

Insurance Policy No. U 945 639 which was
attached to Stipulation filed September
27, 1952

with our legal theories when they permit the great bulk of the casualty damage suit litigation of Louisiana to clog the dockets of the federal courts." Congress granted jurisdiction to the federal courts in diversity of citizenship cases to guard against possible discrimination by the state courts in favor of resident over non-resident litigants. We submit that the action of the court below in reversing the decision of the district court and directing that court to accept jurisdiction in cases of this nature is contrary to the purpose for which diversity jurisdiction was created and conflicts in principle with the decisions of this court and calls for review by this court.

1.

The acceptance by the federal courts of jurisdictions in cases of this nature is contrary to the purpose for which diversity jurisdiction was created and conflicts in principle with the decisions of this court. The principle reason for vesting diversity jurisdiction in the federal courts (if not the sole reason) was to afford a non-resident citizen a fair, unprejudiced and unbiased forum whenever he should become a party to a suit in a state other than his own. *The Historic Basis of Diversity Jurisdiction*, 41 *Harvard Law Rev.* 483. As pointed out in the above cited treatise, the Supreme Court from its earliest application of the provisions creating diversity jurisdiction has been fully cognizant that "there was no reason for taking over business which the state courts could handle without serious prejudice to any national interest."

OPINION OF THE UNITED STATES COURT OF
APPEALS ON REHEARING

MRS. FLORENCE R. ELBERT,

Appellant

vs.

LUMBERMENS MUTUAL CASUALTY COMPANY

Appellee

No. 14,353

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

Rehearing Denied March 17, 1953.

Before HUTCHESON, Chief Judge, and STRUM and
RIVES, Circuit Judges.

PER CURIAM.

It is ordered that the petition for rehearing in the above entitled and numbered cause be, and it is hereby denied.

RIVES, Circuit Judge (dissenting).

On the original hearing, I had strong misgivings which were submitted to my brothers, but I was unable to crystallize my thinking clearly enough to justify a dissent. Continued consideration of the question has convinced me that there is something fundamentally wrong with our legal theories when they permit the great bulk of the casualty damage suit litigation in Louisiana to clog

rehearing is reported at 108 Fed. Supp. 157. The opinion of the Court of Appeals for the Fifth Circuit is reported at 201 Fed (2) 500. Its opinion on rehearing is reported at 202 Fed (2) 744 (also pg 17-28 herein).

JURISDICTION

The original opinion of the Court of Appeals was rendered January 29, 1953, and judgment entered. The appellee (petitioner herein) timely filed an application for rehearing on February 13, 1953. The application for rehearing was denied March 17, 1953. The jurisdiction of this Court is invoked under the provisions of 28 USC 1254(1).

QUESTIONS PRESENTED

The basic questions presented are:

1.

Is the real matter in controversy actually between citizens of different states such as vests jurisdiction in the federal court on the grounds of diversity, where a citizen of Louisiana proceeding under a statute of the State of Louisiana institutes a direct action against a foreign public liability insurer of another citizen of Louisiana to recover damages as the result of an act of negligence committed in Louisiana by the Louisiana assured? This question in turn involves the following subsidiary questions:

In the case of *City of Indianapolis et al vs Chase National Bank* 314 U.S. 63, 86 Law Ed. 47 this Court announced the principles to be applied in determining whether a case falls within the objects and purposes of the diversity jurisdiction provisions and pointed out that to sustain such jurisdiction there must exist an actual, substantial controversy between citizens of different states and that it was the duty of the courts to look beyond the pleadings; that litigation is a pursuit of practical ends and that, therefore, jurisdiction was not to be determined by mechanical rules. It was further pointed out that the court should ascertain the principal purpose of the suit and the primary and controlling matter in dispute. Numerous decisions of this Court were cited as the source establishing these various prerequisites. The principles announced by this Court in the case of *City of Indianapolis et al vs Chase National Bank* (supra) and the prior decisions of this Court cited therein were discussed and applied by the district court in arriving at its decision, but were completely ignored without even so much as a comment by the court below.

There can be no doubt in the minds of anyone but that a local citizen, who institutes a direct action against a non-resident public liability insurance company and tries such action before a jury of laymen under a system whereby the findings of the jury on questions of fact cannot be disturbed, is allowed to enjoy a definite prejudicial advantage over his adversary. Judge Rives observed in his dissent in the instant matter: